

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Petition of Qwest Communications International	)	
Inc. for Forbearance from Enforcement of the	)	WC Docket No. 05-333
Commission's Dominant Carrier Rules As They	)	
Apply After Section 272 Sunsets	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: February 20, 2007**

**Released: March 9, 2007**

By the Commission: Commissioners Copps and Adelstein concurring and issuing a joint statement;  
Commissioner McDowell not participating.

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## I. INTRODUCTION

1. This Order addresses a petition filed by Qwest Communications International Inc. (Qwest),<sup>1</sup> which asks the Commission to forbear, pursuant to section 10 of the Communications Act of 1934, as amended (Communications Act or Act),<sup>2</sup> from applying the Commission’s dominant carrier rules to Qwest’s provision of in-region, interstate, interLATA telecommunications services on an integrated basis.<sup>3</sup> For the reasons set forth below, we find that, provided Qwest complies with certain conditions and continuing statutory obligations, it is appropriate to forbear from section 203 of the Act and our rules for dominant carriers so that Qwest may provide in-region, interstate, interLATA telecommunications services on an integrated basis subject to nondominant carrier regulation.<sup>4</sup>

<sup>1</sup> See Petition of Qwest Communications International Inc. for Forbearance from Enforcement of the Commission’s Dominant Carrier Rules As They Apply After Section 272 Sunset Pursuant to 47 U.S.C. § 160 (filed Nov. 22, 2005), as amended by Petition of Qwest Communications International Inc. for Forbearance from Enforcement of the Commission’s Dominant Carrier Rules As They Apply After Section 272 Sunset Pursuant To 47 U.S.C. § 160 (filed Nov. 30, 2005) (Qwest Petition). On December 8, 2005, the Commission issued a Public Notice seeking comment on the Qwest Petition. See *Pleading Cycle Established for Comments on Qwest’s Petition for Forbearance from Enforcement of the Commission’s Dominant Carrier Rules As They Apply After Section 272 Sunsets*, WC Docket No. 05-333, Public Notice, 20 FCC Rcd 19389 (2005) (*Public Notice*). On November 14, 2006, the Commission, pursuant to Section 10(c) of the Act, extended by 90 days the date by which Qwest’s petition would be deemed granted in the absence of a Commission decision that the petition fails to meet the standards for forbearance under section 10(a) of the Act. *Petition of Qwest Communications International, Inc. for Forbearance from Enforcement of the Commission’s Dominant Carrier Rules As They Apply After Section 272 Sunset Pursuant to 47 U.S.C. § 160*, WC Docket No. 05-333, Order, 21 FCC Rcd 13426 (Wireline Comp. Bur. 2006) (*Qwest Extension Order*). On February 20, 2007, we issued a Public Notice summarizing the terms of this Order. *FCC Conditionally Grants Qwest Forbearance Relief From Dominant Carrier Regulation of In-Region, Interstate, InterLATA Telecommunications Service Provided on an Integrated Basis*, WC Docket 05-333, Public Notice, FCC 07-12 (rel. Feb. 20, 2007).

<sup>2</sup> 47 U.S.C. § 160.

<sup>3</sup> For the sake of convenience, we use the phrase “on an integrated basis” to refer to service provided through Qwest’s Bell Operating Company (BOC) affiliates or through other Qwest affiliates that are not compliant with section 272 or the Commission’s rules implementing that section. See 47 U.S.C. § 272. We also use the term “long distance services” to refer to interLATA telecommunications services. This term encompasses high-capacity services provided to enterprise customers as well as traditional voice services.

<sup>4</sup> We note that AT&T, BellSouth, and Verizon have also filed petitions seeking forbearance from, or waiver of, various requirements that would apply to their provision on an integrated basis of in-region, interstate, interLATA telecommunications services. Petition of the Verizon Local and Long Distance Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Certain Dominant Carrier Regulations for In-Region Interexchange Services, WC Docket No. 06-57 (filed Feb. 28, 2006) (Verizon Forbearance Petition); Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) with Regard to Certain Dominant Carrier Regulations for

(continued....)

## II. BACKGROUND

### A. Commission Regulation of Interstate InterLATA Telecommunications Services

2. In a series of orders in the *Competitive Carrier* proceeding, the Commission distinguished two kinds of carriers – those with individual market power (dominant carriers) and those without market power (nondominant carriers).<sup>5</sup> The Commission found it appropriate to continue to subject dominant carriers to full Title II regulation.<sup>6</sup> The Commission further found, however, that because nondominant carriers lack market power, “application of our current regulatory procedures to nondominant carriers imposes unnecessary and counterproductive regulatory constraints upon a marketplace that can satisfy consumer demand efficiently without government intervention,”<sup>7</sup> and that it was appropriate to streamline regulation of such carriers.<sup>8</sup> AT&T was found to be dominant in the provision of long distance services both because of its large long distance market share and its control of bottleneck local facilities.<sup>9</sup>

(Continued from previous page) \_\_\_\_\_

In-Region, Interexchange Services, WC Docket No. 06-120 (filed June 2, 2006) (AT&T Forbearance Petition); BellSouth Corporation’s Petition for Waiver, CC Docket No. 05-277 (filed Sept. 19, 2005) (BellSouth Waiver Petition) (seeking waiver of certain requirements that would apply to the provision of in-region, interexchange services after the section 272 separate affiliate requirements sunset); Petition of the Verizon Local and Long Distance Telephone Companies for Interim Waiver with Regard to Certain Dominant Carrier Regulations for In-Region Interexchange Services, WC Docket No. 06-57 (filed Feb. 28, 2006) (Verizon Waiver Petition) (same).

<sup>5</sup> *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979); First Report and Order, 85 FCC 2d 1 (1980) (*Competitive Carrier First Report and Order*); Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981); Second Further Notice of Proposed Rulemaking, FCC 82-187, 47 Fed. Reg. 17308 (1982); Second Report and Order, 91 FCC 2d 59 (1982) (*Competitive Carrier Second Report and Order*); Order on Reconsideration, 93 FCC 2d 54 (1983); Third Further Notice of Proposed Rulemaking, 48 Fed. Reg. 28292 (1983); Third Report and Order, 48 Fed. Reg. 46791 (1983); Fourth Report and Order, 95 FCC 2d 554 (1983) (*Competitive Carrier Fourth Report and Order*), *vacated*, *AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), *cert. denied*, *MCI Telecommunications Corp. v. AT&T*, 509 U.S. 913 (1993); *Policy and Rules Concerning Rates for Competitive Carrier Services and Facilities Authorizations Therefor*, Fifth Report and Order, 98 FCC 2d 1191 (1984) (*Competitive Carrier Fifth Report and Order*); Sixth Report and Order, 99 FCC 2d 1020 (1985), *vacated*, *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985) (*Competitive Carrier Sixth Report and Order*), *aff’d*, *MCI v. AT&T*, 512 U.S. 218 (1994) (collectively, the *Competitive Carrier* proceeding); *see* 47 C.F.R. § 61.3(q), (y).

<sup>6</sup> *Competitive Carrier First Report and Order*, 85 FCC 2d at 10-11, para. 26.

<sup>7</sup> *Id.* at 20, para. 54.

<sup>8</sup> *Id.* at 11, para. 27. Specifically, nondominant carriers generally are not subject to direct rate regulation, are subject to reduced tariff obligations, and are accorded presumptive streamlined treatment under section 214 of the Act. *See id.* at 30-49, paras. 85-147; *see also* 47 C.F.R. §§ 1.773(a)(ii), 61.23(c), 63.03(b), 63.71(c).

<sup>9</sup> *See Competitive Carrier First Report and Order*, 85 FCC 2d at 22-23, para. 62. With respect to long-distance market shares, the Commission found that AT&T had “significant market power” in the Message Telecommunications Service (MTS) and Wide Area Telecommunications Service (WATS) market and in the private line service market. *Id.* at 23, paras. 63-64. With respect to control of bottleneck facilities, the Commission found that “[c]ontrol of bottleneck facilities is present when a firm or group of firms has sufficient command over some essential commodity or facility in its industry or trade to be able to impede new entrants.” *Id.* at 21-22, para. 59. AT&T was found to have such control by virtue of the fact that it controlled “access to 80% of the nation’s telephones.” *Id.* at 22-23, para. 62.

3. In February 1996, the Telecommunications Act of 1996 became law.<sup>10</sup> Upon enactment, the 1996 Act permitted the BOCs to provide interLATA services that originate outside of their regions.<sup>11</sup> However, the 1996 Act conditioned the BOCs' provision of in-region, interLATA services on their compliance with certain provisions of section 271 of the Act.<sup>12</sup> Under section 271, the Commission was required to determine, *inter alia*, whether the BOC seeking permission to provide such services had complied with certain market-opening requirements contained in section 271 and with the safeguards imposed by section 272 of the Act and the Commission rules implementing that section.<sup>13</sup> Section 272 requires, *inter alia*, that a BOC provide in-region, interstate, interLATA service only through a structurally separate affiliate that meets the requirements of section 272(b) (section 272 separate affiliate).<sup>14</sup>

4. In the *LEC Classification Order*, the Commission addressed the issue of whether, once a BOC was authorized to provide in-region, interstate, interLATA telecommunications services, its provision of such services should be subject to dominant carrier obligations.<sup>15</sup> In that Order, the Commission focused its analysis on: (1) whether the section 272 separate affiliate could unilaterally raise prices of in-region, interstate, interLATA telecommunications services by restricting its own output; and (2) whether the BOC could indirectly raise prices of those services by increasing the price of essential inputs that its rivals need to offer their services.<sup>16</sup> The Commission found that the section 272 separate affiliates were unlikely to be

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<sup>10</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (1996 Act). The 1996 Act amended the Communications Act of 1934.

<sup>11</sup> See 47 U.S.C. § 271(b)(2).

<sup>12</sup> 47 U.S.C. § 271.

<sup>13</sup> *Id.*

<sup>14</sup> 47 U.S.C. §§ 272(a)(1) and (b). The Commission adopted rules implementing section 272 in the *Non-Accounting and Accounting Safeguards Orders*. See *Implementation of the Accounting Safeguards Under the Telecommunications Act of 1996*, CC Docket No. 96-150, Report and Order, 11 FCC Rcd 17539 (1996) (*Accounting Safeguards Order*); Order on Reconsideration, 14 FCC Rcd 11396 (1996); Second Order on Reconsideration, 15 FCC Rcd 1161 (2000); *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 (1996) (*Non-Accounting Safeguards Order*); First Order on Reconsideration, 12 FCC Rcd 2297 (1997) (*First Order on Reconsideration*), Second Order on Reconsideration, 12 FCC Rcd 8653 (1997) (*Second Order on Reconsideration*), *aff'd sub nom. Bell Atlantic Tel. Cos. v. FCC*, 131 F.3d 1044 (D.C. Cir. 1997), Third Order on Reconsideration, 14 FCC Rcd 16299 (1999) (*Third Order on Reconsideration*).

<sup>15</sup> See *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket Nos. 96-149 & 96-61, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, 12 FCC Rcd 15756, 15762-63, para. 6, & 15802, para. 82 (1997) (*LEC Classification Order*), *recon. denied*, Second Order on Reconsideration and Memorandum Opinion and Order, 14 FCC Rcd 10771 (1999) (*Second Reconsideration Order*).

<sup>16</sup> See *LEC Classification Order*, 12 FCC Rcd at 15802-03, para. 83. In that Order, the Commission distinguished between "classical" (or "Stiglerian") market power, which "is the ability of a firm profitably to raise and sustain its price above the competitive level by restricting its own output," and "exclusionary" (or "Bainian") market power, which is the "ability of a firm profitably to raise and sustain its price significantly above the competitive level by raising its rivals' costs and thereby causing the rivals to restrain their output." *Id.* (citing Thomas G. Krattenmaker, Robert H. Lande & Steven C. Salop, *Monopoly Power and Market Power in Antitrust Law*, 76 GEO. L. J. 241, 249-53 (1987)).

able unilaterally to raise the prices of in-region, interstate, interLATA telecommunications services,<sup>17</sup> and that, although the BOCs possessed market power over bottleneck access facilities, they would not be able to raise the prices of those services indirectly by raising rivals' costs.<sup>18</sup>

5. The Commission further found that dominant carrier regulations were "generally designed to prevent a carrier from raising prices by restricting its own output rather than to prevent a carrier from raising its prices by raising its rivals' costs."<sup>19</sup> Moreover, it found that dominant carrier regulation could "dampen competition" and would impose significant costs and burdens on the BOC section 272 separate affiliates.<sup>20</sup> Based on these findings, the Commission concluded that, so long as the BOCs provided in-region, interstate, interLATA telecommunications services through section 272 separate affiliates, these affiliates should be treated as nondominant in the provision of such services.<sup>21</sup> The Commission recognized, however, that the structural separation requirements in section 272 would sunset three years after the BOCs were authorized to provide in-region, interLATA telecommunications services.<sup>22</sup> The Commission stated that it could not predict how competition would develop over that period or what safeguards, if any, would be needed after the section 272 safeguards sunset.<sup>23</sup> Subsequently, the Commission made clear that, following sunset of the section 272 safeguards, to the extent a BOC chooses to provide in-region, interstate, interLATA telecommunications services on an integrated basis, it would be subject to dominant carrier regulation.<sup>24</sup>

## B. Qwest's Forbearance Petitions

6. In June 2004, Qwest filed a petition requesting, *inter alia*, that the Commission forbear from applying its dominant carrier regulation to Qwest's provision of telecommunications services in the Omaha Metropolitan Statistical Area (MSA).<sup>25</sup> The Commission granted Qwest's request to forbear from applying its price cap, rate of return, tariffing, and 60-day discontinuance rules to interstate mass market exchange

<sup>17</sup> *LEC Classification Order*, 12 FCC Rcd at 15810-12, paras. 96-97.

<sup>18</sup> *Id.* at 15812-33, paras. 98-130.

<sup>19</sup> *Id.* at 15804, para. 85.

<sup>20</sup> *Id.* at 15806-08, paras. 88-90.

<sup>21</sup> *See id.* at 15834-35, paras. 133-34.

<sup>22</sup> *Id.* at 15835, n.391; *see* 47 U.S.C. § 272(f)(1) (specifying that the requirements of section 272, other than those in section 272(e), sunset with respect to BOC provision of interLATA telecommunications services three years after a BOC is authorized to provide such services, unless the Commission extends such three-year period by rule or order). We note that section 272(f)(3) preserves the Commission's authority to prescribe safeguards under other sections of the Act. *See* 47 U.S.C. § 272(f)(3).

<sup>23</sup> *LEC Classification Order*, 12 FCC Rcd at 15835, n.391.

<sup>24</sup> *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, WC Docket No. 02-112, Memorandum Opinion and Order, 17 FCC Rcd 26869, 26870, paras. 1-2, nn.5, 8 (2002) (*Sunset Order*) (citing *LEC Classification Order*, 12 FCC Rcd at 1576, n.12); *see Competitive Carrier Fifth Report and Order*, 98 FCC 2d at 1198-99, n.23 (determining that the Commission would classify the BOCs as dominant in the provision of interstate, interLATA telecommunications services until it determined what safeguards, if any, would be necessary for the BOCs or their affiliates to qualify for nondominant treatment).

<sup>25</sup> Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area, WC Docket No. 04-223 (filed June 21, 2004) (Qwest Omaha Petition).

access services, and mass market broadband Internet access transmission services in the Omaha MSA.<sup>26</sup> The Commission denied forbearance with regard to Qwest's other telecommunications services, including Qwest's enterprise services, because Qwest had failed to provide sufficient information to meet the statutory forbearance criteria.<sup>27</sup>

7. In the instant petition, Qwest states that the section 272 structural safeguards have sunset in all its in-region states as of December 3, 2006,<sup>28</sup> and it asks the Commission, pursuant to section 10 of the Act, to forbear from enforcing its dominant carrier rules with respect to Qwest's provision of in-region, interstate, interLATA telecommunications services on an integrated basis.<sup>29</sup> Specifically, Qwest requests that the Commission forbear from enforcing its part 61 tariffing and price cap requirements and "any other Commission dominant carrier rules" as they might be applied to Qwest's provision of in-region, interstate, interLATA telecommunications services on an integrated basis.<sup>30</sup>

### III. DISCUSSION

#### A. Introduction

8. We conditionally grant in part Qwest's request for forbearance from the application of dominant carrier regulation to its provision, on an integrated basis, of in-region, interstate, interLATA telecommunications services. Specifically, we forbear from applying section 203 of the Act and certain dominant carrier tariffing, price cap, rate of return, discontinuance, and transfer of control rules to Qwest's

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<sup>26</sup> *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, 20 FCC Rcd 19415, 19424, para. 15 (2005) (*Qwest Omaha Order*), *appeal pending*, *Qwest Corp. v. FCC & USA*, No. 04-1450 (D.C. Cir. filed Dec. 12, 2005).

<sup>27</sup> *Id.* at 19426, para. 19.

<sup>28</sup> Qwest Petition at n.6. The Commission granted Qwest interLATA authority for its final in-region state on December 3, 2003. See *Application by Qwest Communications International Inc. for Authorization To Provide In-Region, InterLATA Services in Arizona*, WC Docket No. 03-194, Memorandum Opinion and Order, 21 FCC Rcd 7169 (2003). The provisions of section 272 (other than those in section 272(e)) applicable to Qwest's provision of in-region, interstate, interLATA telecommunications services sunset for the operations of Qwest in its final in-region state by operation of law on December 3, 2006. See *Section 272 Sunsets for Qwest in the State of Arizona by Operation of Law on December 3, 2006 Pursuant to Section 272(f)(1)*, WC Docket No. 02-112, Public Notice, 21 FCC Rcd 14157 (Wireline Comp. Bur. 2006) (*Arizona Sunset Notice*); see also *Section 272 Sunsets for Qwest Communications International Inc. in the States of New Mexico, Oregon, and South Dakota by Operation of Law on April 15, 2006 Pursuant to Section 272(f)(1)*, WC Docket No. 03-11, Public Notice, 21 FCC Rcd 3980 (Wireline Comp. Bur. 2006); *Section 272 Sunsets for Qwest Communications International Inc. in the State of Minnesota by Operation of Law on June 26, 2006 Pursuant to Section 272(f)(1)*, WC Docket No. 03-90, Public Notice, 21 FCC Rcd 6904 (Wireline Comp. Bur. 2006); *Section 272 Sunsets for Qwest Communications International Inc. in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming by Operation of Law on December 23, 2005 Pursuant to Section 272(f)(1)*, WC Docket 02-112, Public Notice, 20 FCC Rcd 20396 (Wireline Comp. Bur. 2005) (*Qwest Multistate Sunset Notice*). Qwest therefore became free to provide in-region, interLATA telecommunications services on an integrated basis on December 3, 2006.

<sup>29</sup> Qwest Petition at 1.

<sup>30</sup> See Qwest Petition at 1-2; see also Qwest Reply at 11; Letter from Timothy M. Boucher, Corporate Counsel, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-333 at 8 (filed Dec. 7, 2006) (Qwest Dec. 7, 2006 *Ex Parte* Letter). For a discussion of the specific regulations from which Qwest seeks forbearance, see *infra* Part III.B.

provision of in-region, interstate, interLATA telecommunications services on an integrated basis, subject to the conditions set forth in part III.E.1.c of this Order.<sup>31</sup> We deny the remainder of Qwest's request to the extent either it requests forbearance from any other statutory provision or Commission rule, or could be construed as seeking forbearance from the application of any dominant carrier regulation to Qwest's provision of telecommunications services other than in-region, interstate, interLATA telecommunications services.

9. As Qwest indicates in its petition,<sup>32</sup> our current rules force it to choose between two different regulatory regimes in providing in-region, interstate, interLATA telecommunications services, both of which impose significant burdens and costs. Qwest either can provide these services on a nondominant carrier basis through a section 272 separate affiliate, or it can provide these services on an integrated basis, subject to dominant carrier regulations, including rate regulation and tariff-filing requirements. Based on the record before us, we conclude that, as applied to Qwest, both of these regulatory regimes impose costs that exceed their benefits. The provision of interstate, interLATA telecommunications services through a section 272 separate affiliate denies Qwest the economies of scope and scale that its competitors are able to realize. Providing interstate, interLATA telecommunications services through a section 272 affiliate requires Qwest, *inter alia*, to operate independently of the BOC and maintain separate officers, directors, and employees from the BOC.<sup>33</sup> These restrictions are inefficient not only because they impose additional costs (such as those for duplicative facilities), but also because they prevent Qwest from taking advantage of the economies of scope and scale associated with an integrated operation. These restrictions may also prevent Qwest and the affiliates from quickly responding to technological and marketplace developments.<sup>34</sup> These restrictions and their associated costs make Qwest a less effective competitor in the market.<sup>35</sup>

10. On the other hand, if Qwest chooses to provide in-region, interstate, interLATA telecommunications services on an integrated basis, it would be subject to dominant carrier regulation, which imposes its own significant costs and burdens, including the costs associated with dominant carrier

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<sup>31</sup> Part III.E.1.b, below, sets forth the specific relief we grant Qwest.

<sup>32</sup> Qwest Petition at 3.

<sup>33</sup> See 47 U.S.C. § 272(b); *see generally Accounting Safeguards Order*, 11 FCC Rcd at 17588-17632, paras. 111-205; *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21976-017, paras. 146-236.

<sup>34</sup> *Cf. Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers*, CC Docket No. 02-33; *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337; *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, CC Docket Nos. 95-20, 98-10; *Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises*, WC Docket No. 04-242; *Consumer Protection in the Broadband Era*, WC Docket No. 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14895, para. 79 (2005) (*Wireline Broadband Internet Access Services Order*), petitions for review pending, *Time Warner Telecom v. FCC*, No. 05-4769 (and consolidated cases) (3rd Cir. filed Oct. 26, 2005).

<sup>35</sup> See Letter from Timothy M. Boucher, Qwest Corporate Counsel, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-333 at 7-9 (filed Jan. 16, 2007) (Qwest Jan. 16, 2007 *Ex Parte* Letter) (listing, among other burdens, mandatory tariffing requirements that would restrict Qwest's ability to respond to competitors' pricing initiatives and require Qwest to give advance notice to competitors of its pricing plans and promotions; stringent transfer of control and discontinuance provisions; and depreciation rules and associated reporting requirements).

price regulation, tariff-filing requirements, and reporting requirements.<sup>36</sup> As the Commission recognized in the *LEC Classification Order*, these regulatory requirements would restrict Qwest's ability to respond to competitors' pricing and product initiatives, and give competitors advance notice of Qwest's own pricing plans and new products.<sup>37</sup> By impeding Qwest's ability to compete, these requirements could also dampen competition.<sup>38</sup> The relief we grant Qwest today allows it to take advantage of the economies associated with integration, while avoiding the unnecessary costs and burdens of the existing regulatory regimes, and should result in increasing competition in the markets for interstate, interLATA telecommunications services.

## B. Scope of Qwest's Petition

11. The first step in our forbearance review is to identify the specific relief Qwest requests in its petition, including the statutory provisions and Commission regulations that Qwest identifies in its petition and in subsequent clarifications.<sup>39</sup> In its petition, Qwest seeks the ability to provide in-region, interstate, interLATA telecommunications services on an integrated basis free of dominant carrier regulation.<sup>40</sup> In its petition and subsequent submissions, Qwest indicates that this relief will require that the Commission forbear with respect to its in-region, interstate, interLATA telecommunications services from: (1) sections 214 (a), (c), and (d) of the Act, which apply to "entry and discontinuance of services or transfers of control by dominant carriers" and any portion of section 272 of the Act that would require Qwest to provide in-region, interstate, interLATA telecommunications services "through a Section 272 affiliate or any other separate affiliate in order to be deemed non-dominant;"<sup>41</sup> (2) sections 61.28, 61.31-.38, 61.41-.49, 61.58-.59, 65.1(b)(1), 65.1(b)(3), and 65.600 of our rules,<sup>42</sup> which set forth dominant carrier price cap and rate of return regulations and require dominant carriers to file tariffs on up to 15-days notice with cost support; (3) sections 63.03, 63.10, 63.18, 63.19, 63.21, 63.23, and 63.60-.90 of our rules,<sup>43</sup> which apply to entry and

<sup>36</sup> *Id.* at 7-9; see also *LEC Classification Order*, 12 FCC Rcd at 15806-08, paras. 88-90; see also Qwest Reply at 6-7, n.21 (asserting that the reason "no Regional BOC has chosen to operate as a dominant carrier in states where 272 has sunset [is] . . . that it is uneconomical to do so").

<sup>37</sup> See *LEC Classification Order*, 12 FCC Rcd at 15806-08, paras. 88-90; see also Qwest Jan. 16, 2007 *Ex Parte* Letter at 6-7.

<sup>38</sup> See generally *LEC Classification Order*, 12 FCC Rcd at 15806-08, paras. 88-89.

<sup>39</sup> See *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, Memorandum Opinion and Order, 17 FCC Rcd 27000, 27010, para. 18 (2002) (*SBC Advanced Services Forbearance Order*).

<sup>40</sup> Qwest Petition at 1-2.

<sup>41</sup> *Id.* at 2, n.6; Qwest Reply at 11; Qwest Jan. 16, 2007 *Ex Parte* Letter at 9.

<sup>42</sup> Qwest Petition at 2; Qwest Reply at 11; Qwest Jan. 16, 2007 *Ex Parte* Letter at 6-8. Specifically, Qwest seeks relief from the following rules: 47 C.F.R. § 61.28 (tariffing requirements for dominant international carriers); 47 C.F.R. §§ 61.31-.38 (tariffing requirements for dominant carriers); 47 C.F.R. §§ 61.41-.49 (general requirements for carriers subject to price cap regulation); 47 C.F.R. §§ 61.58-.59 (tariff notice requirements for price cap carriers); 47 C.F.R. § 65.1(b)(1) (application of rate of return prescription procedures and methodologies for interstate access services); 47 C.F.R. § 65.1(b)(3) (application of rate of return prescription procedures and methodologies for price cap carriers offering rate of return services); 47 C.F.R. § 65.600 (reporting requirements for carriers subject to rate of return regulation).

<sup>43</sup> Qwest Petition at 2, n.6; Qwest Reply at 11; Qwest Jan. 16, 2007 *Ex Parte* Letter at 9; see 47 C.F.R. § 63.03 (procedures for domestic transfer of control applications); 47 C.F.R. § 63.10 (regulatory classification of U.S. international carriers); 47 C.F.R. § 63.18 (notification and approval of U.S. international carriers affiliated with

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discontinuance of services or transfers of control by dominant carriers; and (4) sections 43.21, 43.43, and 43.51 of our rules,<sup>44</sup> which impose contract filing and reporting requirements.

### C. Sufficiency of Qwest's Petition

12. Before we examine the merits of Qwest's petition, we address certain procedural objections. First, COMPTTEL maintains that Qwest's petition is premature because Qwest's in-region, interstate, interLATA telecommunications services currently are not subject to dominant carrier regulation, and because Qwest has made no decision as to how it will offer these long distance services in the future.<sup>45</sup> COMPTTEL argues that, under our *SBC IP Forbearance Denial Order*,<sup>46</sup> the petition therefore should be denied on the ground that the requested relief is hypothetical.<sup>47</sup> We disagree. Because Qwest is now free to provide in-region, interstate, interLATA telecommunications services on an integrated basis, and because our existing rules will subject Qwest to dominant carrier regulation if it chooses to do so, those rules bear directly on Qwest's near-term plans for its corporate structure. Qwest's petition therefore is neither hypothetical nor premature. Furthermore, we find COMPTTEL's argument to be inconsistent with the D.C. Circuit's subsequent holding, on appeal of the *SBC IP Forbearance Denial Order*, that "the Commission may not refuse to consider a [forbearance] petition's merits solely because the petition seeks forbearance from uncertain or hypothetical regulatory obligations."<sup>48</sup> Thus, we must consider Qwest's petition on its merits regardless of how Qwest currently provides its in-region, interLATA telecommunications services. Moreover, it would be unreasonable to require Qwest to first assume all of the dominant carrier obligations it seeks to avoid before it may petition for forbearance from them. Such obligations are clearly predictable and identifiable in any event.

13. Second, other commenters argue that it is improper or unwise for us to consider Qwest's petition until we have completed the *Section 272 Sunset* proceeding,<sup>49</sup> which examines related issues as they affect the industry at large.<sup>50</sup> They argue that addressing Qwest's petition prior to completing that

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foreign carriers); 47 C.F.R. § 63.19 (procedures for discontinuing international services); 47 C.F.R. § 63.21 (conditions that apply to international section 214 authorizations); 47 C.F.R. § 63.23 (conditions that apply to resale-based international common carriers); 47 C.F.R. §§ 63.60-90 (definitions, rules, and procedures that apply to the discontinuance, reduction, outage, and impairment of services).

<sup>44</sup> Qwest Petition at 2; Qwest Reply at 11; Qwest Jan. 16, 2007 *Ex Parte* Letter at 9-10; see 47 C.F.R. § 43.21 (affiliate transactions); 47 C.F.R. § 43.43 (reports of proposed changes in depreciation rates); 47 C.F.R. § 43.51 (filing of carrier contracts and concessions).

<sup>45</sup> COMPTTEL Comments at 3-4, 6.

<sup>46</sup> *Petition of SBC Communications Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services*, WC Docket No. 04-29, Memorandum Opinion and Order, 20 FCC Rcd 9361 (2005) (*SBC IP Forbearance Denial Order*), remanded, *AT&T Inc. v. FCC*, 452 F.3d 830 (D.C. Cir. 2006) (*AT&T v. FCC*).

<sup>47</sup> COMPTTEL Comments at 1, 3-4, 6.

<sup>48</sup> *AT&T v. FCC*, 452 F.3d at 837.

<sup>49</sup> *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, WC Docket No. 02-112, Notice of Proposed Rulemaking, 17 FCC Rcd 9916 (2002) (*Section 272 Sunset NPRM*); *Section 272(f) Sunset of the BOC Separate Affiliate and Related Requirements*, WC Docket No. 02-112, Further Notice of Proposed Rulemaking, 18 FCC Rcd 10914 (2003) (*Section 272 Sunset and Independent LEC Further NPRM*).

<sup>50</sup> See, e.g., AT&T Comments at 5-6; COMPTTEL Comments at 6-7; Level 3 Comments at 4.

rulemaking could distort our analysis or cause us to prejudge issues pending in that broader rulemaking proceeding.<sup>51</sup> We disagree. Section 10(c) provides that a forbearance petition “shall be deemed granted if the Commission does not deny the petition” within one year, which can be extended by an additional 90 days.<sup>52</sup> Because this statutory period of one year plus ninety days ends on February 20, 2007, Qwest will obtain the relief sought in its petition as of that date absent a Commission decision denying that relief. In these circumstances, we find the better course is to address Qwest’s petition within the period specified in section 10(c), rather than to allow Qwest to obtain the relief it seeks subject to any action we subsequently may take in the *Section 272 Sunset* rulemaking.

#### D. Market Analysis

14. In the *Competitive Carrier Proceeding*, the Commission determined that dominant carrier regulation was not necessary to ensure just, reasonable and nondiscriminatory rates and practices where a carrier lacked individual market power.<sup>53</sup> In the *LEC Classification Order*, the Commission elaborated on the conditions under which a carrier could exercise market power.<sup>54</sup> Consistent with this Commission precedent, we begin our analysis by first defining the relevant product and geographic markets.<sup>55</sup> We then consider whether Qwest could exercise market power with respect to in-region, interstate, interLATA telecommunications services if it provides such services on an integrated basis, by either: (1) unilaterally raising the retail price of its in-region, interstate, interLATA telecommunications services (*i.e.*, exercising “classical” market power); or (2) using its control over bottleneck local facilities to raise its rivals’ costs (*i.e.*, exercising “exclusionary” market power). We conclude that Qwest lacks classical market power in regard to these services, but may continue to have exclusionary market power by reason of its control of bottleneck facilities.

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<sup>51</sup> See, e.g., AT&T Comments at 5-6 (arguing that addressing Qwest’s Petition unreasonably puts Qwest’s concerns before the needs of the entire industry); COMPTel Comments at 6-7; Level 3 Comments at 4.

<sup>52</sup> 47 U.S.C. § 160(c).

<sup>53</sup> See, e.g., *Competitive Carrier First Report and Order*, 85 FCC 2d at 19, para. 51, & 20-21, paras. 55-56.

<sup>54</sup> See *LEC Classification Order*, 12 FCC Rcd at 15802-04, paras. 83-85.

<sup>55</sup> A relevant product market has been defined as the smallest group of competing products for which a hypothetical monopoly provider of the products would profitably impose at least a “‘small but significant and nontransitory’ increase in price.” Horizontal Merger Guidelines, issued by the U.S. Department of Justice and the Federal Trade Commission, §§ 1.11, 1.12 (Apr. 2, 1992, revised Apr. 8, 1997) (*DOJ/FTC Guidelines*); see also *Application of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation*, CS Docket No. 01-348, Hearing Designation Order, 17 FCC Rcd 20559, 20605-06, para. 106 (2002) (*EchoStar/DirectTV Order*). A relevant geographic market has been defined “as the region where a hypothetical monopolist that is the only producer of the relevant product in the region would profitably impose at least a ‘small but significant and nontransitory’ increase in the price of the relevant product, assuming that the prices of all products provided elsewhere do not change.” *EchoStar/DirectTV Order*, 17 FCC Rcd at 20609, para. 117 (citing *DOJ/FTC Guidelines* § 1.21).

## 1. Relevant Product Markets

### a. Mass Market Services

15. Based on the record in this proceeding and consistent with the *SBC/AT&T* and *Verizon/MCI* merger orders,<sup>56</sup> we identify two relevant product markets for our mass market analysis: (1) stand-alone long distance services; and (2) bundled local and long distance services. Also, consistent with those orders, we consider both the demand for “access” and demand for “usage” when defining our relevant product markets.<sup>57</sup>

#### i. Stand-Alone Long Distance Services

16. Consistent with the Commission’s findings in the *SBC/AT&T* and *Verizon/MCI Merger Orders*, there is significant evidence in the record here that long distance service purchased on a stand-alone basis is becoming a fringe market. This evidence includes the 2004 decision by legacy AT&T to cease marketing long distance services and the declining proportion of consumers that choose a long distance provider different from their local service provider.<sup>58</sup> Nonetheless, out of an abundance of caution and to ensure consistency with Commission precedent,<sup>59</sup> we analyze stand-alone long distance as a separate, relevant product market.

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<sup>56</sup> *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18336-46, paras. 82-99 (2005) (*SBC/AT&T Order*); *Verizon Communications Inc. and MCI, Inc. Application for Approval of Transfer of Control*, WC Docket No. 05-75, Memorandum Opinion and Order, 20 FCC Rcd 18433, 18477-87, paras. 83-100 (2005) (*Verizon/MCI Order*). We use the term “*BOC/IXC Orders*” to refer collectively to the *SBC/AT&T Order* and the *Verizon/MCI Order*. In prior proceedings, the Commission has defined mass market customers as residential and small business customers that purchase standardized offerings of communications services. See, e.g., *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, CC Docket No. 97-211, Memorandum Opinion and Order, 13 FCC Rcd 18025, 18040, para. 24 (1998) (*WorldCom/MCI Order*); *Application of Ameritech Corp. and SBC Communications Inc. for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission’s Rules*, CC Docket No. 98-141, Memorandum Opinion and Order, 14 FCC Rcd 14712, 14746, para. 68 (1999) (*SBC/Ameritech Order*).

<sup>57</sup> *SBC/AT&T Order*, 20 FCC Rcd at 18336-37, para. 84; *Verizon/MCI Order*, 20 FCC Rcd at 18477-78, para. 85. As the Commission explained, a consumer requires “access” in order to connect to a communications network, whether it be a wireline telephone network, a mobile wireless network, or the public Internet. Because a mass market consumer today can choose one or more access providers, his demand for usage – i.e., how much of a service he actually consumes – will be determined by the set of access providers he has chosen, the prices and terms set by those access providers, and other personal characteristics of the consumer. Thus, for example, if a consumer has a wireless phone, a wireline phone, and a broadband connection plus an interconnected voice over Internet Protocol (VoIP) service subscription, he can make a long distance call using either a phone or through the broadband connection. To the extent that consumers view these choices as reasonable substitutes, they are in the same product market for purposes of our analysis. See *EchoStar/DirectTV Order*, 17 FCC Rcd at 20606, para. 106.

<sup>58</sup> In the *SBC/AT&T Order* and *Verizon/MCI Order*, the Commission determined that the stand-alone market was becoming a fringe market based upon documentary evidence submitted in those proceedings. There is no information in this proceeding to cause us to reconsider this conclusion. See *SBC/AT&T Order*, 20 FCC Rcd at 18342, para. 91; *Verizon/MCI Order*, 20 FCC Rcd at 18483, para. 92.

<sup>59</sup> See *SBC/AT&T Order*, 20 FCC Rcd at 18336, para. 82; *Verizon/MCI Order*, 20 FCC Rcd at 18477, para. 83.

17. As discussed below, we consider two alternative measures of market share in analyzing stand-alone long-distance services. The first measure considers only consumers with a presubscribed wireline long-distance carrier. This approach is consistent with the approach the Commission adopted in the *SBC/AT&T* and *Verizon/MCI* merger orders.<sup>60</sup> We recognize that this approach is overly narrow, however, and will tend to overstate Qwest's market position, because it ignores the facts that all presubscribed interexchange customers can also make interLATA calls using transaction services (such as prepaid calling cards and dial-around services), and that a majority of these customers also subscribe to mobile wireless service and can make interLATA calls using their wireless phones.<sup>61</sup> In order to capture the possibility of such usage substitution, we therefore also perform a second market share calculation, which attempts to take into account the ability of presubscribed customers to engage in usage substitution.<sup>62</sup>

18. In prior orders, the Commission has found that it may be appropriate to define narrower relevant product markets based on customer class if service providers engage in price discrimination.<sup>63</sup> Both the record and the long-distance carriers' web sites indicate that carriers generally offer multiple alternative long-distance service packages to mass-market customers, which vary in terms of their monthly recurring charges and per-minute charges.<sup>64</sup> These alternative packages appear designed to appeal to customer groups with differing demand patterns for long-distance services. While such pricing plans generally benefit consumers, we believe that certain consumers who make relatively few long-distance calls that subscribe only to a wireline long-distance provider and do not subscribe to mobile wireless service or broadband Internet access service may not face the same wide choice of alternative providers. Moreover,

<sup>60</sup> See *SBC/AT&T Order*, 20 FCC Rcd at 18347, n.309; *Verizon/MCI Order*, 20 FCC Rcd at 18489, n.308.

<sup>61</sup> See, e.g., *SBC/AT&T Order*, 20 FCC Rcd at 18342-44, paras. 92-99; *Verizon/MCI Order*, 20 FCC Rcd at 18484-85, paras. 93-95 (finding that customers substitute, at least to some extent, mobile wireless services and transaction services for interLATA calls made through their presubscribed wireline carrier); see also Letter from Melissa Newman, Vice President-Federal Regulatory, Qwest to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-333, Attach. A at 4 (filed Jan. 10, 2007) (Qwest Jan. 10, 2007 *Ex Parte* Letter) (providing Yankee Group Report, *Pervasive Substitution Precedes Displacement and Fixed-Mobile Convergence in Latest Wireless Trends* (Dec. 2005) (December 2005 Yankee Group Report) that states [REDACTED] of households have a wireless phone). The Bureau of Labor Statistics estimated that, in 2004, approximately 52 percent of U.S. households subscribe to both a wireline and a mobile wireless provider. Clyde Tucker, J. Michael Brick, Brian Meekins, and David Morganstein, *Household Telephone Service and Usage Patterns in the United States in 2004*, at 4, available at <http://www.bls.gov/ore/pdf/st040130.pdf> (Household Telephone Survey).

<sup>62</sup> Qwest uses residential white pages listings to estimate the number of consumers served by facilities-based providers. See Qwest Jan. 10, 2007 *Ex Parte* Letter, Attach. 1.f. We therefore include facilities-based VoIP services in these calculations to the extent that consumers of these services are listed in residential white pages listings. Because of limitations in available data, our calculations do not include over-the-top VoIP services or transaction services (such as prepaid calling cards). The exclusion of these services will tend to overstate Qwest's market position. For the reasons given in the *SBC/AT&T Order* and *Verizon/MCI Order*, we reject Qwest's suggestion that we should include e-mail and instant messaging in the relevant service markets for long distance services provided to mass market consumers. *SBC/AT&T Order*, 20 FCC Rcd at 18342, para. 91, n.282; *Verizon/MCI Order*, 20 FCC Rcd at 18484, para. 92 n.282; Qwest Dec. 7, 2006 *Ex Parte* Letter, Attach., Declaration of Dennis W. Carlton, Hal Sider, and Allan Shampine (Qwest Carlton/Sider/Shampine Decl.) at paras. 32-33.

<sup>63</sup> See, e.g., *SBC/AT&T Order*, 20 FCC Rcd at 18323, para. 60; *Verizon/MCI Order*, 20 FCC Rcd at 18465, para. 60.

<sup>64</sup> For example, Qwest advertises three domestic long distance plans on its website: an unlimited long distance plan for \$25 per month; a usage-based plan with a \$4.99 monthly recurring charge and a \$0.05 per minute usage-based charge; and a usage-based plan with a \$0.99 monthly recurring charge and a \$0.15 per minute usage-based charge. See <http://www.qwest.com/residential/productsandservices/ld/domestic/index.html> (visited Jan. 9, 2007).

although there is insufficient information in the record for us to conclude that such customers constitute a separate relevant product market, we are concerned, as was the Commission in the *AT&T Reclassification Proceeding*,<sup>65</sup> that competition for such customers may not be as intense as it is for higher volume long-distance users.

## ii. Bundled Local and Long Distance Services

19. Consistent with the *SBC/AT&T* and *Verizon/MCI* merger orders, we also find it appropriate to define and examine a separate relevant product market for bundled local and long distance services.<sup>66</sup> Because of the varied marketing strategies and limitations in the data, we define a local and long distance service bundle,<sup>67</sup> for purposes of this proceeding only, as a customer's purchase of local and long distance services from the same carrier, regardless of whether these services are purchased together as part of an advertised bundle from a single carrier or the consumer creates the bundle by selecting separately-offered local and long distance service plans from the same provider. The evidence indicates that a majority of consumers purchase local and long distance services from a single provider today and that this percentage has been increasing over time.<sup>68</sup> We find that this trend is likely to continue and that the stand-alone wireline long distance market is steadily declining in size relative to the bundled services market.<sup>69</sup>

20. Several other factors support our defining a separate relevant product market for bundled local and long distance services. First, we find that Qwest's marketing and pricing strategies are designed to

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<sup>65</sup> *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, 3315-16, paras. 84-85 (1995) (*AT&T Reclassification Order*).

<sup>66</sup> See *SBC/AT&T Order*, 20 FCC Rcd at 18344-45, paras. 95-96; *Verizon/MCI Order*, 20 FCC Rcd at 18485-86, paras. 96-97.

<sup>67</sup> The economics literature generally discusses two types of bundles: a pure bundle, where the bundled services are only sold together and are not sold individually; and a mixed bundle, where the bundled services are sold individually, as well as in a package. In a mixed bundle, the package generally is sold at a discount relative to the sum of the individual service component prices. See, e.g., Barry Nalebuff, *Bundling, Tying and Portfolio Effects*, DTI Economics Paper No. 1, at 14-15 (2003), available at <http://www.dti.gov.uk/files/file14774.pdf>. There is significant variation across providers as to whether they offer a pure bundle or a mixed bundle of communications services.

<sup>68</sup> The Commission reports that as of December, 2005, 58 percent of regional BOC retail local consumer lines and 88 percent of competitive local exchange carrier (competitive LEC) lines were presubscribed to the local provider's long distance service, compared with 52 percent of regional BOC lines and 80 percent of competitive LEC lines as of June 2005. See *Local Telephone Competition: Status as of December 31, 2005*, at Table 6 (Industry Analysis and Technology Div., Wireline Comp. Bur. July 2006); *Local Telephone Competition: Status as of June 30, 2005*, at Table 6 (Industry Analysis and Technology Div., Wireline Comp. Bur. April 2006); see also *SBC/AT&T Order*, 20 FCC Rcd at 18344-45, paras. 95-96; *Verizon/MCI Order*, 20 FCC Rcd at 18485-86, paras. 96-97. We note, however, that as of December 2006, only [REDACTED] of Qwest's retail local consumer lines were presubscribed to Qwest's long distance service. Letter from Melissa Newman, Vice President-Federal Regulatory, Qwest to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-333, Attach. 1.ii (corrected) (filed Jan. 17, 2007) (Qwest Jan. 17, 2007 *Ex Parte* Letter).

<sup>69</sup> We note that the Commission had anticipated that a bundled product market might become a relevant product market sometime after the BOCs completed the section 271 process. See, e.g., *Applications of NYNEX Corporation and Bell Atlantic Corporation for Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, Memorandum Opinion and Order, 12 FCC Rcd 19985, 20010-11, paras. 39-42 (1997) (*Bell Atlantic/NYNEX Order*); *WorldCom/MCI Order*, 13 FCC Rcd at 18038-39, para. 22 n.60. Qwest completed the section 271 process in December 2003. See *supra* n.28.

encourage subscription to a bundled service package.<sup>70</sup> Second, the evidence in the record indicates that intermodal competition between wireline services and services provided on alternative service platforms, such as facilities-based VoIP and mobile wireless, has been increasing and is likely to continue to increase.<sup>71</sup> These intermodal services tend to be offered as a bundle of local and long distance services.<sup>72</sup> These findings suggest that competition is increasingly occurring between bundled offerings, rather than between a bundled package offered by an intermodal competitor and stand-alone local and long distance services offered by incumbent LECs.

### **b. Enterprise Services**

21. Retail enterprise customers purchase a variety of different communications services, including local voice, long distance and international voice, and data services.<sup>73</sup> In addition, enterprise customers frequently purchase high-capacity transmission services,<sup>74</sup> including Frame Relay,<sup>75</sup> Asynchronous

<sup>70</sup> For example, Qwest's advertising suggests that consumers can save by purchasing bundled services. See <http://pcat.qwest.com/pcat/bundlesMain.do?salesChannel=res>. (visited Jan. 16, 2007).

<sup>71</sup> See North American Numbering Plan Numbering Resource Utilization/Forecast Report, Confidential Form 502 Filings; *Numbering Resource Optimization*, CC Docket 99-200, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 7574 (2000) (indicating that, as of June, 2006, cable companies provided service to over 1 million phone numbers); Qwest Jan. 10, 2007 *Ex Parte* Letter, Attach. A at 8 (citing Yankee Group report that forecasts [REDACTED]; Qwest Jan. 16, 2007 *Ex Parte* Letter, Attach. 1.g at 5-8.

<sup>72</sup> Promotional information for facilities-based VoIP providers generally appears to focus on bundled offerings. See, e.g., Optimum Voice, What is It?, available at <http://www.optimum.com/voice/what.jsp> (visited Feb. 16, 2007) (Cablevision's product "offers unlimited local, regional and long-distance calling within the United States, Puerto Rico and Canada"); Comcast, Services for You, available at <http://www.comcast.com/Benefits/VoiceBenefits.aspx?link1k=59> (visited Feb. 16, 2007) (offering "unlimited local and long distance"); Time Warner Cable, Unlimited Calling, available at <http://www.timewarnercable.com/corporate/products/digitalphone/unlimitedcallingdigitalphone.html> (visited Feb. 16, 2007) (offering "unlimited calls anywhere in the U.S. and Canada for one low monthly price"). Mobile wireless service providers likewise promote bundled offerings. See, e.g., Cingular Wireless, Cingular Plans, available at [http://www.cingular.com/cell-phone-service/cell-phone-plans/?\\_requestid=87830](http://www.cingular.com/cell-phone-service/cell-phone-plans/?_requestid=87830) ("Never pay domestic long distance or roaming charges!"); T-Mobile, T-Mobile Stick Together, available at [http://www.t-mobile.com/templates/generic.aspx?passet=Pln\\_Lst\\_MyFavesLrnDemo](http://www.t-mobile.com/templates/generic.aspx?passet=Pln_Lst_MyFavesLrnDemo) ("Unlimited nationwide calling to any five numbers\* on any network, even landlines."); Verizon Wireless, America's Choice, at <http://www.verizonwireless.com/b2c/store/controller?item=planFirst&action=viewPlanList&sortOption=priceSort&typeId=1&subTypeId=1&catId=323> ("Unlimited Domestic Long Distance").

<sup>73</sup> See *SBC/AT&T Order*, 20 FCC Rcd at 18321-22, para. 57; *Verizon/MCI Order*, 20 FCC Rcd at 18463, para. 56.

<sup>74</sup> The specific technology used by the individual enterprise customer depends on availability, needed capacity, services required, and desired service quality levels. Enterprise services could include some number of DS0 circuits or high-capacity circuits of DS1 or higher bandwidth, such as DS3, and OCn circuits. See, e.g., *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17155-56, para. 298 (2003) (*Triennial Review Order*) (discussing services typically purchased by enterprise customers). A DS0 is a two-wire basic connection, which operates at 64,000 bits per second (bps), the worldwide standard speed for digitizing voice conversation using pulse code modulation. HARRY NEWTON, *NEWTON'S TELECOM DICTIONARY*, 273 (20th ed., 2004) (defining "DS-0") (*NEWTON'S TELECOM DICTIONARY*). A DS1 is a four-wire connection equivalent to 24 DS0s. A DS3 is equivalent to 28 DS1s. These circuits may be purchased by customers from state and federal tariffs. See *Triennial Review Order*, 18 FCC Rcd at 17155-56, para. 298.

Transfer Mode (ATM),<sup>76</sup> Gigabit Ethernet,<sup>77</sup> and similar services provided via emerging technologies.<sup>78</sup> Retail enterprise customers also purchase other facilities and customer premises equipment (CPE).<sup>79</sup>

22. Consistent with Commission precedent and with the record in this proceeding,<sup>80</sup> we find that the services offered to enterprise customers fall into a number of separate relevant product markets. More specifically, we find that long distance voice and data services constitute distinct relevant product markets.

23. We have less information about the substitutability of different transmission services. While there are data indicating that the number of customers for Frame Relay is declining on a nationwide basis, while the number of IP transmission services customers is increasing,<sup>81</sup> we do not have data on elasticities (and cross elasticities) of demand for particular transmission services. Similarly, we lack sufficient information about the migration time, price differences, and service quality differences that customers face when deciding to change from one transmission service to another. Thus, the evidence is insufficient for us to define precisely the boundaries of those transmission service markets. Given the data available in the record, and for purposes of this proceeding only, we focus on four services: long distance voice services, Frame Relay, T1, and T3 services.<sup>82</sup>

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<sup>75</sup> Frame Relay is a high-speed data service that allows local area networks (LANs) to be connected across a public network. See TELECOMMUNICATIONS INDUSTRY ASSOCIATION, 2006 TELECOMMUNICATIONS MARKET REVIEW AND FORECAST 138 (2006) (TIA 2006 MARKET REVIEW). A T-1 provides the same speed and capacity service as a DS1. See *Triennial Review Order*, 18 FCC Rcd at 17104-05, para. 202 n.634. Similarly, a T-3 provides the same speed and capacity service as a DS3.

<sup>76</sup> ATM service can guarantee different quality of service levels to meet various customer needs. ATM offers higher reliability and greater capacity because it combines the advantages of circuit-switched and packet-switched networks, guaranteeing the delivery of information that is intolerant of delays, while allocating bandwidth more efficiently. See TIA 2006 MARKET REVIEW at 140-42.

<sup>77</sup> Gigabit Ethernet is a LAN standard that allows a network to accommodate the high-bandwidth requirements of converged voice, video, and data network applications. See TIA 2006 MARKET REVIEW at 125.

<sup>78</sup> Enterprises are increasing their use of IP Virtual Private Networks (IP-VPNs), which deliver private network services over shared IP-based backbones; and carriers are migrating to Multiprotocol Label Switching (MPLS), which provides label switching to move packets between network locations. See TIA 2006 MARKET REVIEW at 134-36. MPLS is similar to other circuit-switched, ATM, and Frame Relay network protocols, except that MPLS is not dependent on a particular technology. See, e.g., MPLS Resource Center, *The MPLS FAQ*, available at <http://www.mplsresource.com/faq1.shtml#MPLS%20History> (visited July 31, 2006).

<sup>79</sup> See *SBC/AT&T Order*, 20 FCC Rcd at 18322, para. 57.

<sup>80</sup> See *SBC/AT&T Order*, 20 FCC Rcd at 18322, para. 58; *Verizon/MCI Order*, 20 FCC Rcd at 18464, para. 58; Qwest Jan. 16, 2007 *Ex Parte* Letter, Attachs. 3-4.

<sup>81</sup> From 1997 through 2002, the number of Frame Relay ports more than tripled to 1.3 million; since then, however, the market has shifted to IP-VPNs, and Frame Relay port growth has dropped. See TIA 2006 MARKET REVIEW at 140. From 2000 through 2005, ATM service revenues nearly tripled, from \$1.1 billion to \$2.70 billion. *Id.* at 143. The number of ATM ports in the United States reached a peak of 40,000 in 2005, however, and that number was expected to decline in 2006. *Id.* at 142. As newer technologies emerge, ATM's role as a backbone technology appears to be declining as enterprise customers increase their use of IP-VPNs. *Id.*

<sup>82</sup> Our analysis of particular product markets is determined by the availability of data in this record. Qwest has provided data for its region from a third party vendor (Harte-Hanks). These data are based on a

(continued....)

24. In previous orders, the Commission has found it appropriate to define separate relevant product markets based on the class of customer (particularly where there is “price discrimination”).<sup>83</sup> As the Commission previously has discussed, however, there does not appear to be industry-wide consensus as to how to differentiate one class of enterprise customers from another.<sup>84</sup> The Commission generally has found, however, that a number of factors influence how carriers price their services to particular types of customers, including: the customer’s total telecommunications spending; the types of services and technologies ordered; the customer’s total employee count; the customer’s total annual revenues; and whether the customer obtains customized services.<sup>85</sup> Based on the data available to us in the record, we find it appropriate to focus our analysis on two categories of business customers: small/medium businesses and large enterprises.<sup>86</sup>

## 2. Relevant Geographic Markets

25. The Commission previously has recognized that each customer location constitutes a separate relevant geographic market. For reasons of administrative practicality, however, the Commission has aggregated customers facing similar competitive choices to create larger relevant geographic markets.<sup>87</sup>

### a. Mass Market Services

26. The data in the record are not sufficiently detailed to define localized relevant geographic markets in which customers face similar competitive choices. Accordingly, consistent with the approach adopted in, and for the reasons given in, the *SBC/AT&T* and *Verizon/MCI* merger orders, we analyze stand-

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telecommunications survey that queries businesses about their contracting for services, including long distance voice services, ATM, Frame Relay, T1, and T3 services. In general, we limit our analysis to geographic areas with at least 30 observations. We exclude the “UNSPECIFIED” category from our analysis because it represents incomplete responses. The survey for ATM services includes at least 30 observations [REDACTED]. Qwest Jan. 16, 2007 *Ex Parte* Letter, Attachs. 4.a-b.

<sup>83</sup> See *SBC/AT&T Order*, 20 FCC Rcd at 18323, para. 60; *Verizon/MCI Order*, 20 FCC Rcd at 18465, para. 60.

<sup>84</sup> See *SBC/AT&T Order*, 20 FCC Rcd at 18323-24, para. 61; *Verizon/MCI Order*, 20 FCC Rcd at 18465-66, para. 61.

<sup>85</sup> See *SBC/AT&T Order*, 20 FCC Rcd at 18323-24, para. 61; *Verizon/MCI Order*, 20 FCC Rcd at 18465-66, para. 61.

<sup>86</sup> See *SBC/AT&T Order*, 20 FCC Rcd at 18323-24, para. 61; *Verizon/MCI Order*, 20 FCC Rcd at 18465-66, para. 61. Qwest defines two broad customer categories, enterprise customers (customers with 11 or more telephone access lines at a business location) and small business customers (customers with fewer than 11 telephone lines at a business location). Qwest Jan. 16, 2007 *Ex Parte* Letter, Attach. 3 at 1. Our analysis of particular enterprise customer classes is determined by the availability of data in this record. The Harte-Hanks customer count data for enterprise customers submitted by Qwest is segmented into [REDACTED]. See Qwest Jan. 16, 2007 *Ex Parte* Letter, Attachs. 4.a-b. These business segments do not, however, generally conform to the categorization schemes used by Qwest, and in a number of cases include markets with fewer than 30 observations. We therefore analyze a small/medium category utilizing aggregated Harte Hanks [REDACTED] data and a large enterprise category utilizing Harte Hanks [REDACTED] data.

<sup>87</sup> See *SBC/AT&T Order*, 20 FCC Rcd at 18345-46, paras. 62, 97-99; *Verizon/MCI Order*, 20 FCC Rcd at 18466-67, paras. 62, 98-100.

alone long distance and bundled local and long distance services in Qwest's franchise area within each state.<sup>88</sup>

**b. Enterprise Services**

27. The data in the record are likewise not sufficiently detailed to define localized relevant geographic markets in which all enterprise customers face the same competitive choices. Consistent with Commission precedent, we will use the most disaggregated data available in performing our structural analysis for different types of business services and for certain broad classes of business customers. For enterprise customers with single locations in Qwest's region, we use the most disaggregated data in this record to complete our analysis. We present data at the state level because that is the most disaggregated data available that allows us to assess Qwest's presence in its franchise areas for the services and customer classes considered in this Order.<sup>89</sup>

28. For larger, multi-location enterprise customers, we find that these customers typically seek service from a provider that can serve all their locations, and generally only a few carriers serving a particular location have such capabilities. In light of the fact that there are relatively few providers that can offer a high level of ubiquitous service, the Commission in previous orders has concluded that this geographic market should encompass all the geographic locations where these multi-location business customers may have a presence.<sup>90</sup> Because of limitations in the data, however, we will use Qwest's various states for analyzing all classes of business customers.<sup>91</sup>

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<sup>88</sup> See *SBC/AT&T Order*, 20 FCC Rcd at 18346, para. 99; *Verizon/MCI Order*, 20 FCC Rcd at 18487, para. 100. We reject Qwest's suggestion that we define the relevant geographic market for mass market services as the nation or Qwest's entire in-region territory. Qwest December 7, 2006 *Ex Parte* Letter at 4 (arguing that there is no evidence in this record that would cause us to reconsider our prior finding on the relevant geographic market for long distance services provided to mass market consumers). Although we acknowledge that, in the *LEC Classification Order*, the Commission only distinguished between a BOC's in-region territory and its out-of-region territory, the Commission also stated that "the market to purchase a plan is a localized market, not a national one, and that it would consider a smaller relevant geographic market if it found evidence that there is, or could be, a lack of competition in a particular market." *LEC Classification Order*, 12 FCC Rcd at 15794, para. 66; see also *SBC/AT&T Order*, 20 FCC Rcd 18345-46, paras. 97-98; *Verizon/MCI Order*, 20 FCC Rcd 18486-87, paras. 98-99. We further recognize that the competitive choices customers face may vary within a state (e.g., cable companies may provide cable VoIP in some areas of a state but not others), and that Qwest might be able to offer more localized promotions for bundled service offerings. While these factors suggest that we should define the relevant geographic market at a more disaggregated level than Qwest's franchise area within each of its in-region states, the data in the record are not sufficiently detailed for us to perform such a disaggregated analysis. We find, however, as we did in the *SBC/AT&T Order* and the *Verizon/MCI Order*, that analyzing the data at the franchise level is reasonable, particularly given that Qwest's pricing for stand-alone long distance service does not vary across its franchise areas. See <http://www.qwest.com/residential/productsandservices/ld/domestic/index.html> (visited Jan. 4, 2007).

<sup>89</sup> Cf. *SBC/AT&T Order*, 20 FCC Rcd at 18324-25, para. 62; *Verizon/MCI Order*, 20 FCC Rcd at 18466-67, para. 62 (adopting similar approach). We analyze state-level data, by the size of the enterprise, for four service classifications: long distance voice; Frame Relay; T1; and T3. To avoid relying on results that are based on too few observations, we present results only for those markets for which there are at least 30 observations.

<sup>90</sup> See, e.g., *SBC/AT&T Order*, 20 FCC Rcd at 18325, para. 63; *Verizon/MCI Order*, 20 FCC Rcd at 18467, para. 63.

<sup>91</sup> The Commission previously has recognized that large business customers with multiple locations throughout the United States may constitute a separate relevant product market. See, e.g., *SBC/AT&T Order*, 20 FCC Rcd at

(continued....)

### 3. Market Participants

#### a. Mass Market

29. The record indicates that Qwest faces competition from a variety of providers of retail mass market services. These competitors include competitive wireline local exchange and long-distance carriers, stand-alone long distance providers, facilities-based VoIP providers, cable circuit-switched service providers, and wireless carriers, to the extent that consumers use their services as a replacement for local or long distance services.<sup>92</sup>

#### b. Enterprise Market

30. Likewise, the record indicates that there are numerous categories of competitors providing services to enterprise customers. These include interexchange carriers, competitive LECs, data/IP network providers, cable companies, other incumbent LECs, VoIP providers, systems integrators, and equipment vendors.<sup>93</sup>

### 4. Analysis of Traditional Market Power Factors

31. We consider first whether Qwest currently has such a significant presence in the relevant markets for interstate, interLATA telecommunications services that it has the ability unilaterally and profitably to raise the price of such services. Our analysis examines Qwest's market shares for the aforementioned relevant product markets, trends in its market share, demand substitutability, and supply substitutability.

#### a. Mass Market Services

32. We conclude that Qwest lacks individual, classical market power with respect to the mass market interstate, interLATA telecommunications services. Although the market share calculations for stand-alone interstate, interLATA telecommunications services indicate a moderately high level of concentration in certain of Qwest's franchise areas, we find that these calculations significantly overstate Qwest's market position in those markets, particularly when one considers other market factors that affect market power. As discussed in greater detail below, we are concerned, as was the Commission in the *AT&T Reclassification Order*,<sup>94</sup> that Qwest residential customers who make few long distance calls and who do not also subscribe to wireless or broadband Internet access service may have fewer competitive choices among interstate, interLATA long distance providers and may not be able to avoid the impact of a

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18325, para. 63; *Verizon/MCI Order*, 20 FCC Rcd at 18467, para. 63. While this record contains only limited, relatively dated data on this customer class, these data suggest that there are at least three other carriers that have significantly larger market presence than Qwest Letter from Timothy M. Boucher, Corporate Counsel, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-333, Appendix 1 at 15 (filed Jan. 22, 2007) (Qwest Jan. 22, 2007 *Ex Parte* Letter).

<sup>92</sup> As discussed above, we do not include over-the-top VoIP for purposes of this market analysis. *See supra* n.62; *see also* Letter from Melissa Newman, Vice President-Federal Regulatory, Qwest to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-333, Attachs. 1.b, 1.c, 1.d (filed Jan. 8, 2007) (Qwest Jan. 8, 2007 *Ex Parte* Letter); Qwest Jan. 10, 2007 *Ex Parte* Letter, Attach. 1.f.

<sup>93</sup> *See* Qwest Jan. 16, 2007 *Ex Parte* Letter, Attachs. 4.a-b.

<sup>94</sup> *AT&T Reclassification Order*, 11 FCC Rcd at 3313-14, paras. 81-82.

price increase by engaging in usage substitution. We also are concerned that these customers may not receive the information regarding their monthly long distance usage that they need to make informed choices among alternative long-distance calling plans. However, as discussed below, Qwest has committed itself to continue offering certain calling plans and providing adequate long distance usage information.<sup>95</sup> We find that Qwest's commitments adequately address these concerns.<sup>96</sup>

**i. Stand-Alone Long Distance Market Share**

33. Consistent with the Commission's analysis in the *SBC/AT&T* and *Verizon/MCI Merger Orders*, we first consider Qwest's market share of wireline customers that have a presubscribed interexchange carrier.<sup>97</sup> Using this methodology, the data in the record suggest that Qwest has a significant market share in most of its franchise areas in the Qwest territory.<sup>98</sup> Under this approach, Qwest's market share of stand-alone long distance services ranges from [REDACTED] percent to [REDACTED] percent, with a median market share of [REDACTED] percent.<sup>99</sup>

34. As discussed above, however, these market shares are likely to overstate Qwest's share of the interstate long distance market, and its potential market power, for a number of reasons. First, this analysis is limited to customers who have a presubscribed interexchange carrier (PIC), but in recent years, an increasing number of customers are choosing to have no PIC. For example, data submitted by Qwest show that, with respect to its mass market wireline customers, only [REDACTED] have Qwest as their PIC, while [REDACTED] have no PIC.<sup>100</sup> More importantly, this approach to calculating market shares fails to take into account possible usage substitution between wireless and wireline long distance services (for

<sup>95</sup> See Letter from Melissa E. Newman, Vice President, Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-333, Attach. at 1 (filed Feb. 8, 2007) (Qwest Feb. 8, 2007 *Ex Parte* Letter).

<sup>96</sup> See *infra* Part III.E.1.c.

<sup>97</sup> See *SBC/AT&T Order*, 20 FCC Rcd at 18347, n.309; *Verizon/MCI Order*, 20 FCC Rcd at 18489, n.308.

<sup>98</sup> Market share calculations for each of Qwest's franchise areas are provided in Appendix B, Table 1. Our analysis of concentration in the mass market relies upon data for residential customers because of the administrative difficulty of distinguishing small business data from data for other classes of businesses. An analysis of market shares of residential consumers is likely to accurately represent an analysis of market shares for the entire mass market because residential customers and small businesses have similar patterns of demand, are served primarily through mass marketing techniques, purchase similar volumes and communications services, and would likely face the same competitive alternatives within a geographic market. Thus, we conclude that an analysis of market share of residential consumers is likely to accurately represent Qwest's position in the mass market as a whole. See, e.g., *SBC/AT&T Order*, 20 FCC Rcd at 18347, para. 102, n.307; *Verizon/MCI Order*, 20 FCC Rcd at 18488, para. 103, n.306.

<sup>99</sup> We base our analysis of the stand-alone long distance market on Qwest's local exchange customers with a PIC, Qwest's interexchange customers that do not subscribe to Qwest's local service, the number of resold lines leased by Qwest's competitors, the number of Qwest Platform Plus lines leased by Qwest's competitors, and Qwest's estimate of facilities-based lines. See Qwest Jan. 8, 2007 *Ex Parte* Letter, Attachs. 1.b, 1.d; Qwest Jan. 10, 2007 *Ex Parte* Letter, Attach. 1.f; Qwest Jan. 17, 2007 *Ex Parte* Letter, Attachs. 1.a.i (corrected), 1.a.ii (corrected). This analysis implicitly assumes that customers that receive local services from a competitive LEC generally subscribe to that carrier for their long distance services. We believe this to be a reasonable assumption given that fewer than [REDACTED] Qwest interexchange customers did not subscribe to Qwest's local service in December 2006. See Qwest Jan. 16, 2007 *Ex Parte* Letter, Attach. 2.

<sup>100</sup> See Qwest Jan. 17, 2007 *Ex Parte* Letter, Attach. 1.ii (corrected).

customers that subscribe to both wireless and wireline telephone services) or between wireline and over-the-top VoIP (for customers that subscribe to both wireline telephone service and broadband Internet access service). While we lack the data necessary to estimate the impact of usage substitution between traditional wireline long-distance service and long-distance service provided by *over-the-top VoIP*, we can calculate market shares in a way that attempts to capture usage substitution between wireline and *wireless* long-distance service providers.<sup>101</sup> Taking such wireline-wireless usage substitution into account, Qwest's market share ranges from [REDACTED] percent to [REDACTED] percent, with a median market share of [REDACTED] percent. Given the large and growing percentage of consumers who subscribe to both a wireline service provider and a wireless and/or broadband Internet access service provider,<sup>102</sup> and who thus have the ability to shift usage in response to price changes, we find that these market share numbers are likely to provide a more accurate picture of Qwest's market power in the stand-alone long distance market. We note in this regard that Qwest's extremely limited presence as a wireless service provider (it exclusively resells wireless service and has captured only [REDACTED] of wireless subscribers in the Qwest states)<sup>103</sup> strongly suggests that if the price of bundled wireline service or stand-alone long distance service goes up, few of Qwest's customers will switch to a Qwest wireless service.

## ii. Bundled Local and Long Distance Market Shares

35. As discussed above, an increasing number of customers are shifting to bundled service offerings and away from stand-alone long-distance offerings. While we recognize the conceptual difficulties associated with estimating market shares for this bundled services market, we believe that we have adopted a conservative approach, which, if anything, will again tend to overstate Qwest's market position.<sup>104</sup> We estimate that, for its franchise areas within its in-region states, Qwest's market share of

<sup>101</sup> This analysis focuses on those customers that subscribe to *both* a wireline and a mobile wireless service. Our analysis assumes that 10 percent of households have cut-the-cord and that [REDACTED] of households subscribe to a mobile wireless services provider. See Qwest Jan. 10, 2007 *Ex Parte* Letter, Attach. A at 4 (citing December 2005 Yankee Report that [REDACTED] of households subscribe to wireless services); see also *id.* at Attach. 1.f; Qwest Jan. 8, 2007 *Ex Parte* Letter, Attachs. 1.b, 1.d, 1.h, 1.j; Qwest Jan 17, 2007 *Ex Parte* Letter, Attachs. 1.a.i (corrected), 1.a.11 (corrected). We estimate Qwest's market share of the stand-alone long distance market by calculating the following: (Qwest's local lines with Qwest as a presubscribed interexchange carrier + Qwest's interexchange customers that do not have Qwest as a local service provider + Qwest's estimate of its residential mobile wireless subscribers – Qwest's estimate of its residential mobile wireless subscribers that have cut-the-cord) / (the number of competitive LEC residential lines + Qwest's residential lines with a presubscribed interexchange carrier + the estimated number of residential wireless lines that have not cut-the-cord).

<sup>102</sup> See Qwest Jan. 10, 2007 *Ex Parte* Letter, Attach. A at 4 (citing December 2005 Yankee Report that [REDACTED] of households have a mobile wireless phone); *High-Speed Services for Internet Access: Status as of June 30, 2006*, at Table 3 (Industry Analysis and Technology Div., Wireline Comp. Bur. Jan. 2007) (*High-Speed Services Jan. 2007 Report*), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-270128A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-270128A1.pdf).

<sup>103</sup> See Qwest Jan. 8, 2007 *Ex Parte* Letter, Attach. 1.j.i.

<sup>104</sup> Our analysis here focuses on those customers that subscribe to a bundle of local and long distance services from the same carrier. Moreover, for wireless customers, this analysis only considers customers who have “cut the cord.” Consumers that subscribe to local service from one carrier and long distance service from another carrier are included in our analysis of the stand-alone long distance market. See *supra* Part III.D.4.a.i.

bundled local and long distance services ranges from [REDACTED] percent to [REDACTED] percent, with a median market share of [REDACTED] percent.<sup>105</sup>

### iii. Other Factors

36. Traditionally, the Commission, in evaluating whether a carrier possesses individual market power, has considered not only current market share, but also such factors as trends in market share, elasticity of demand, and elasticity of supply.<sup>106</sup> Consideration of these factors further supports our conclusion that Qwest lacks individual market power with respect to mass market, interstate, interLATA telecommunications services.

37. We begin by considering trends in market shares. We acknowledge that Qwest's share of the stand-alone long distance market, measured in terms of presubscribed wireline customers, has increased over the past three years. While such an increase might normally be an indicator of market power, there are several reasons to reject such an inference here. First, since Qwest entered the market with a zero market share only slightly more than three years ago, it is to be expected that its market share would be increasing. Second, reflecting the decline in the stand-alone long-distance market, legacy AT&T and MCI, traditionally the two largest stand-alone interexchange carriers, decided in 2004 to cease marketing such services; this has led to a decrease in their market share and a concomitant increase in Qwest's. A more important trend, however, has been the increasing number of consumers who now subscribe to multiple access services, including wireless service and broadband Internet access services (which permits customers then to subscribe to an over-the-top VoIP service).<sup>107</sup> This increase in access choices has allowed customers to engage in increasing usage substitution. This trend evidence provides further support for our finding that Qwest lacks market power in the provision of mass market interstate, interLATA telecommunications services.

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<sup>105</sup> Like our analysis of the stand-alone long distance market, *see supra* n.101, our analysis of this bundled market assumes that 10 percent of households have cut-the-cord. *See* Qwest Jan. 10, 2007 *Ex Parte* Letter, Attach. A at 4 (citing December 2005 Yankee Report); *see also id.* at Attach 1.f; Qwest Jan. 8, 2007 *Ex Parte* Letter Attachs. 1.b, 1.d, 1.h, 1.j; Qwest Jan. 17, 2007 *Ex Parte* Letter, Attach. 1.a.i (corrected). We estimate Qwest's share of this bundled market by calculating the following: (Qwest's local lines with Qwest as a presubscribed interexchange carrier + Qwest's estimate of its residential mobile wireless subscribers that have cut-the-cord) / (the number of competitive LEC residential lines + Qwest's local lines with Qwest as a presubscribed interexchange carrier + the estimated number of mobile wireless lines used by households that have cut-the-cord).

<sup>106</sup> *See, e.g., AT&T Reclassification Order*, 11 FCC Rcd at 3346, para. 139.

<sup>107</sup> *See* Qwest Jan. 10, 2007 *Ex Parte* Letter, Attach. A at 4 (citing December 2005 Yankee Report that [REDACTED] of households have a mobile wireless phone); *High-Speed Services Jan. 2007 Report* at Table 3. We note that these market developments have occurred since the Commission adopted the *LEC Classification Order* in 1997. Specifically, at that time, personal communications service (PCS) carriers were only beginning to initiate services in a relatively small number of markets. *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, Second Report, 12 FCC Rcd 11266, 11290 (1997) (reporting that PCS licensees had initiated services in portions of 29 major trading areas). Mobile wireless carriers had not yet begun to offer regional or national calling plans that permit consumers to place what would have been toll calls without incurring additional per minute charges. *See Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, 16 FCC Rcd 13350, 13377 (2001) (reporting that, in 1998, AT&T became the first wireless carrier to offer a large bucket of minutes plan with a regional or national footprint, but that virtually all of the major operators offered similar plans by 2001). Further, few customers had access to, or subscribed to broadband Internet Access Service. *High-Speed Services Jan. 2007 Report* at Table 3 (showing less than 3.2 million subscribers nationwide in 2000).

38. In addition, the Commission traditionally considers demand substitutability factors. The record in this proceeding does not include data sufficient for us to estimate precisely the own-price elasticity of demand for stand-alone long distance or bundled local and long distance services. Nor does the record permit us to determine the cross-elasticity of demand between interstate, interLATA telecommunications services provided by wireline carriers and similar services provided by wireless carriers and over-the-top VoIP providers. Nevertheless, the evidence in the record is consistent with the Commission's previous finding that customers are highly sensitive to changes in the price of wireline interstate, interLATA telecommunications services and that customers are willing to shift usage to wireless and over-the-top VoIP providers in response to changes in relative prices.<sup>108</sup> More specifically, the increase in the number of customers subscribing to competitive wireline and cable services suggests an increase in the elasticity of demand for Qwest's services.<sup>109</sup> In addition, the increase in subscriptions to broadband Internet access services (which permits customers then to subscribe to an over-the-top VoIP service with a long distance component),<sup>110</sup> the increase in subscriptions to mobile wireless services,<sup>111</sup> and the migration of wireline minutes to mobile wireless minutes indicate that consumers are increasingly finding that these alternatives services serve as substitutes for traditional wireline long-distance services offered by Qwest and other carriers.<sup>112</sup>

39. Finally, with respect to supply substitutability, we note that the Commission, in the *LEC Classification Order*, found that there was significant excess capacity for the provision of interstate interLATA telecommunications services, which would permit competitors to expand their output should a BOC attempt to raise the price of these services.<sup>113</sup> Moreover, in the recent *BOC/IXC Orders*, the Commission reaffirmed its finding that the wholesale interexchange service market is competitive due to substantial excess capacity.<sup>114</sup> There is no evidence in this record that would cause us to reevaluate this finding.

40. Accordingly, based on the foregoing market analysis, we find that Qwest lacks individual, classical market power in the provision of the mass market services considered in this Order. Despite this

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<sup>108</sup> See Qwest Jan. 10, 2007 *Ex Parte* Letter, Attach. A at 4 (citing December 2005 Yankee Report that [REDACTED] of households have a mobile wireless phone); *High-Speed Services Jan. 2007 Report* at Table 3.

<sup>109</sup> See Appendix B, Table 1; see also *infra* n.71; Qwest Jan. 10, 2007 *Ex Parte* Letter, Attach. 1.f.

<sup>110</sup> *High-Speed Services Jan. 2007 Report* at Table 3. We base this conclusion on the Commission's findings in the *SBC/AT&T Order* and *Verizon/MCI Order*. See, e.g., *SBC/AT&T Order*, 20 FCC Rcd at 18369-72, paras. 147-52; *Verizon/MCI Order*, 20 FCC Rcd at 18337-40, paras. 86-88. There is no evidence in the record to suggest that consumers within the Qwest region would view VoIP services differently than would consumers in other BOC regions.

<sup>111</sup> See *Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, WT Docket No. 06-17, Eleventh Report, 21 FCC Rcd 10947, 11009-11, paras. 157-61 (2006) (*Eleventh CMRS Competition Report*).

<sup>112</sup> See, e.g., *id.* at 11027, para. 206; *Universal Service Contribution Methodology*, WC Docket No. 06-122, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518 (2006) (*Universal Service Contribution Methodology Order*), *appeal pending*, *Vonage Holdings Corp. v. FCC & USA*, No. 06-1276 (D.C. Cir. filed July 18, 2006).

<sup>113</sup> *LEC Classification Order*, 12 FCC Rcd at 15811, para 97.

<sup>114</sup> See, e.g., *SBC/AT&T Order*, 20 FCC Rcd at 18369-72, paras. 147-52; *Verizon/MCI Order*, 20 FCC Rcd at 18510-12, paras. 145-51.

general finding, the record does raise two areas of potential concern. The first concern relates to low volume long distance users that do not also subscribe to a wireless service provider or broadband Internet access provider. In the *AT&T Reclassification Proceeding*, the Commission expressed concern that, while AT&T lacked individual market power in the provision of mass market, interstate interLATA telecommunications services, customers that make few long distance calls might nevertheless be harmed by the elimination of price cap regulation for AT&T's Basket One services.<sup>115</sup> In response, AT&T offered certain commitments to protect low volume consumers, which the Commission accepted and made conditions of its Order.<sup>116</sup> Here, we are concerned that consumers that make few long distance calls and that do not subscribe to wireless service or broadband Internet access service may face fewer competitive choices among interstate, interLATA long-distance providers, and may not be able to avoid the impact of a price increase by engaging in usage substitution. We address this concern in part III.E.1.c, below.

41. Our second concern relates to a potential information failure that may prevent consumers from selecting the most cost-effective long distance plan. Consumers today that subscribe to wireline unlimited long distance plans often are not informed of their monthly usage of wireline long distance minutes. Without such information on their toll usage, however, they may have insufficient information to determine whether it might be more cost-effective for them to select a long-distance plan that offers a limited number of toll minutes or charges long-distance calls on a per-minute basis. In this regard, we agree with the New Jersey Ratepayer Advocate that a consumer needs transparency in pricing to ensure that he chooses the carrier that best suits his needs.<sup>117</sup> We address this concern in part III.E.1.c, below.

#### **b. Retail Enterprise Services**

42. We conclude that Qwest lacks individual, classical market power with respect to interstate, interLATA telecommunications services for the enterprise market. In evaluating whether Qwest possesses individual market power, we consider Qwest's market share, Qwest's competitors' market share, trends in Qwest's market shares, factors affecting demand substitutability, and supply substitutability. Although we find that Qwest's market shares for certain of the relevant products are relatively high,<sup>118</sup> we nonetheless conclude that Qwest lacks individual market power with respect to the relevant enterprise services that are considered in this proceeding.

#### **i. Market Shares**

43. We reject the market share data initially submitted by Qwest for interLATA service revenues for enterprise and small business customers because the market shares are based [REDACTED] and are not based upon Qwest's individual franchise areas.<sup>119</sup> We instead use data Qwest subsequently submitted to calculate market shares and Herfindahl-Hirschman Index (HHI) estimates for Qwest and its competitors for long distance voice and data enterprise services for geographic areas for which we have sufficient

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<sup>115</sup> AT&T's Basket One services included residential and small business services. See *AT&T Reclassification Order*, 11 FCC Rcd at 3277, para. 8.

<sup>116</sup> See *AT&T Reclassification Order*, 11 FCC Rcd at 3315, para. 84.

<sup>117</sup> New Jersey Ratepayer Advocate Comments at 12.

<sup>118</sup> See Appendix B, Tables 2-3.

<sup>119</sup> We note that Qwest submitted multiple sets of market share estimates. See, e.g., Qwest TNS Dec. 7, 2006 *Ex Parte* Letter at 12-14; Qwest Carlton/Sider/Shampine Decl. at paras. 22-26; Qwest Jan. 16, 2007 *Ex Parte* Letter, Attach. 5.a.i.

data.<sup>120</sup> In general, the market share calculations indicate a moderate level of concentration in most franchise areas for many relevant services for *large* enterprise customers with significant operations in Qwest's region.<sup>121</sup> Qwest's median statewide market share for long distance voice services is [REDACTED] percent for the states within its region.<sup>122</sup> Qwest's median statewide market share for Frame Rely data services is [REDACTED] percent for the states within its region.<sup>123</sup> Qwest's median statewide market share for T1 data services is [REDACTED] percent for the states within its region.<sup>124</sup> Qwest's median statewide market share for T3 data services is [REDACTED] percent for the states within its region.<sup>125</sup>

44. Similarly, the market share calculations indicate a moderate level of concentration in most franchise areas for many relevant services for small/medium business customers with significant operations in Qwest's region. Qwest's median statewide market share for long distance voice services is [REDACTED] percent for the states within its region.<sup>126</sup> Qwest's median statewide market share for Frame Rely data services is [REDACTED] percent for the states within its region.<sup>127</sup> Qwest's median statewide market share for TI data services is [REDACTED] percent for the states within its region.<sup>128</sup>

45. The aforementioned market shares and accompanying estimates of level of concentration suggest that Qwest operates in a moderately concentrated market for long distance voice services and the

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<sup>120</sup> The HHI is calculated as the sum of the squares of the market shares of each firm participating in a relevant market. The HHI can range from nearly zero in the case of an atomistic market to 10,000 in the case of a pure monopoly. Because the HHI is based on the squares of the market shares of the participants, it gives proportionately greater weight to carriers with larger market shares. *See DOJ/FTC Guidelines* § 1.5.

<sup>121</sup> Our analysis of Qwest's market position is based upon analysis of third-party data supplied by Qwest. Qwest Jan. 16, 2007 *Ex Parte* Letter, Attachs. 4.a-b. These business segments do not generally conform to the categorization schemes used by Qwest; and thus may overstate or understate the actual level of concentration in each relevant geographic market. *See supra* para. 24. In general, we limit our analysis to geographic areas with at least 30 observations. We exclude the "UNSPECIFIED" category from our analysis because it represents incomplete responses.

<sup>122</sup> Appendix B, Table 2. Qwest's market share ranges from [REDACTED] with an accompanying HHI of [REDACTED] to [REDACTED] with an accompanying HHI of [REDACTED].

<sup>123</sup> Appendix B, Table 2. Qwest's market share ranges from [REDACTED] with an accompanying HHI of [REDACTED] to [REDACTED] with an accompanying HHI of [REDACTED].

<sup>124</sup> Appendix B, Table 2. Qwest's market share ranges from [REDACTED] with an accompanying HHI of [REDACTED] to [REDACTED] with an accompanying HHI of [REDACTED].

<sup>125</sup> Appendix B, Table 2. Qwest's market share ranges from [REDACTED] with an accompanying HHI of [REDACTED] to [REDACTED] with an accompanying HHI of [REDACTED].

<sup>126</sup> Appendix B, Table 3. Qwest's market share ranges from [REDACTED] with an accompanying HHI of [REDACTED] to [REDACTED] with an accompanying HHI of [REDACTED].

<sup>127</sup> Appendix B, Table 3. Qwest's market share ranges from [REDACTED] with an accompanying HHI of [REDACTED] to [REDACTED] with an accompanying HHI of [REDACTED].

<sup>128</sup> Appendix B, Table 3. Qwest's market share ranges from [REDACTED] with an accompanying HHI of [REDACTED] to [REDACTED] with an accompanying HHI of [REDACTED]. There were sufficient observations to consider T3 services only for [REDACTED]. Qwest market share is [REDACTED] and the HHI for this market is [REDACTED].

data services evaluated in this Order. These data further suggest that a significant number of competitors operate within each of these markets.

## ii. Other Factors

46. Although the record in this proceeding does not include estimates of either the price elasticity of demand or the elasticity of supply for interstate, interLATA telecommunications services within Qwest's region, the Commission's findings in the recent *BOC/IXC Orders* help to inform our analysis here. Specifically, we find no reason to expect the companies operating within Qwest's region to behave differently from those that operate in the other BOC territories. Thus, consistent with the Commission's conclusions in the recent *BOC/IXC Orders*, we find that enterprise customers tend to be sophisticated purchasers of communications services, whether they are located solely within Qwest's region, or have locations both inside and outside Qwest's region. Because these users tend to make their decisions about communications services by using either communications consultants or employing in-house communications experts, we expect them to be aware of the multitude of choices available to them. Accordingly, we find that the current level of competition for these services in the Qwest franchise area, together with the safeguards that we impose in this Order, are sufficient to support a grant of Qwest's forbearance petition.<sup>129</sup>

## 5. Qwest Control of Bottleneck Access Facilities

47. We next consider whether Qwest, if it provides in-region, interLATA telecommunications services on an integrated basis, could indirectly raise the price of those services by raising rivals' costs through its control over bottleneck facilities.<sup>130</sup> Qwest asserts that it faces "significant" competition within its region from "wireline, wireless, and other forms of intermodal competition,"<sup>131</sup> that its retail access line base has "declined significantly,"<sup>132</sup> and that its "connection share" of the residential local exchange market is declining.<sup>133</sup> Qwest has failed, however, to present persuasive evidence that it no longer possesses exclusionary market power within its region as a result of its control over a ubiquitous telephone exchange service and exchange access network. We therefore assume, for the purposes of this proceeding, that Qwest continues to possess exclusionary market power within its region by reason of its control over these bottleneck access facilities.<sup>134</sup>

<sup>129</sup> See *SBC/AT&T Order*, 20 FCC Rcd at 18332-33, para. 75; *Verizon/MCI Order*, 20 FCC Rcd at 18474, para. 75.

<sup>130</sup> See *LEC Classification Order*, 12 FCC Rcd at 15812-13, paras. 98, 100.

<sup>131</sup> Qwest Petition at 8-9; see generally Qwest Petition, Teitzel Decl. at 4-17; Qwest Reply, Teitzel Rebuttal Decl. at 2-11.

<sup>132</sup> Qwest Petition, Teitzel Decl. at 2.

<sup>133</sup> *Id.* at 3-4.

<sup>134</sup> See *LEC Classification Order*, 12 FCC Rcd at 15835, para. 134; see also Level 3 Comments at 3, 9-11 (arguing that Qwest has significant market power in the provision of access to end-user locations throughout its territory); AdHoc Reply at 20-24.

### E. Application of Forbearance Criteria to Qwest's Petition

48. The goal of the 1996 Act is to establish “a pro-competitive, de-regulatory national policy framework.”<sup>135</sup> An integral part of this framework is the requirement, set forth in section 10 of the 1996 Act, that the Commission forbear from applying any provision of the Act, or any of the Commission’s regulations, if the Commission makes certain specified findings with respect to such provisions or regulations.<sup>136</sup> Specifically, the Commission is required to forbear from any statutory provision or regulation if it determines that: (1) enforcement of the regulation is not necessary to ensure that charges, practices, classifications, or regulations are just and reasonable, and are not unjustly or unreasonably discriminatory; (2) enforcement is not necessary to protect consumers; and (3) forbearance is consistent with the public interest.<sup>137</sup> In making this determination, the Commission must also consider pursuant to section 10(b) “whether forbearance from enforcing the provision or regulation will promote competitive market conditions.”<sup>138</sup>

49. We apply below the criteria of section 10 to the statutory provisions and regulations from which Qwest seeks relief,<sup>139</sup> and we conditionally forbear from applying dominant carrier regulation to Qwest’s provision, on an integrated basis, of in-region, interstate, interLATA telecommunications services. Qwest therefore may provide these services on an integrated basis subject to nondominant carrier regulation, pursuant to the obligations set forth herein.

#### 1. Section 10(a)(1) – Charges, Practices, Classifications, and Regulations

50. Section 10(a)(1) of the Act requires that we consider whether the statutory provisions and regulations from which Qwest seeks forbearance are necessary to ensure that the “charges, practices, classifications, or regulations . . . for [] or in connection with that . . . telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory” if Qwest provides such services on an integrated basis.<sup>140</sup> In its petition, Qwest argues that, in light of in-region, interLATA telecommunications

<sup>135</sup> Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 113 (1996).

<sup>136</sup> 47 U.S.C. § 160(a).

<sup>137</sup> *Id.*

<sup>138</sup> 47 U.S.C. § 160(b).

<sup>139</sup> In its Reply, the New Jersey Ratepayer Advocate asserts that any exercise of our forbearance authority in section 10 would “violate separation of powers, equal protection, [the 10th] amendment, and [the 11th] amendment.” New Jersey Ratepayer Advocate Reply at 15. The New Jersey Ratepayer Advocate makes no attempt to develop this argument, and we find the New Jersey Ratepayer Advocate’s assertion insufficient to call into question section 10’s constitutionality. See *Sprint Corp. v. FCC*, 331 F.3d 952, 960 (D.C. Cir. 2003) (Administrative Procedure Act does not require the Commission to respond to conclusory comments); *MCI WorldCom v. FCC*, 209 F.3d 760, 765 (D.C. Cir. 2000) (holding that a party did not raise an argument with sufficient force to obligate the Commission to respond); *Application by Verizon Maryland Inc., Verizon Washington, D.C. Inc., Verizon West Virginia Inc., Bell Atlantic Communications Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization To Provide In-Region, InterLATA Services in Maryland, Washington, D.C., and West Virginia*, WC Docket No. 02-384, Memorandum Opinion and Order, 18 FCC Rcd 5212, 5282 n.469 (2003) (regulatory agencies are not required to address arguments not stated with sufficient force or clarity).

<sup>140</sup> 47 U.S.C. § 160(a)(1).

competition, dominant carrier regulation is no longer necessary to ensure that the charges, practices, classifications, and regulations in connection with Qwest's provision, on an integrated basis, of in-region, interstate, interLATA telecommunications services are just, reasonable, and not unreasonably discriminatory, and that Qwest therefore satisfies this forbearance criterion.<sup>141</sup>

51. As our market analysis makes clear, we find that Qwest generally lacks classical market power in the provision of in-region, interstate, interLATA telecommunications services.<sup>142</sup> We therefore find that Qwest will likely be unable to raise and maintain the prices of its in-region, interstate, interLATA telecommunications services above competitive levels. For the same reason, we find that Qwest will likely be unable to impose and maintain unjust or unreasonable practices, classifications, and regulations for these services. Faced with similar findings in the *LEC Classification Order*, the Commission concluded that, when carriers lack classical market power, the benefits of dominant carrier regulation are outweighed by its burdens.<sup>143</sup> Consistent with this precedent, we find that classical market power concerns generally do not require that we apply dominant carrier regulation to Qwest's provision of in-region, interstate, interLATA telecommunications services on an integrated basis.

52. Despite this general finding, we are concerned, as was the Commission in the *AT&T Reclassification Order*,<sup>144</sup> that Qwest residential customers who make few long distance calls and who do not also subscribe to wireless or broadband Internet access service may have fewer competitive choices among interstate, interLATA long distance providers and may not be able to avoid the impact of a price increase by engaging in usage substitution. We also are concerned that these customers may not receive the information regarding their monthly long distance usage that they need to make informed choices among alternative long-distance calling plans. As discussed below,<sup>145</sup> however, Qwest has committed itself to continue offering certain calling plans and providing billing information.<sup>146</sup> We find that Qwest's commitments adequately address these concerns. Given these commitments, we also find, consistent with the Commission's findings in the *AT&T Reclassification* and *LEC Classification Orders*,<sup>147</sup> that Qwest's possibly having classical market power with regard to these residential customers does not require that we apply dominant carrier regulation to Qwest's provision, on an integrated basis, of in-region, interLATA, telecommunications services in order to ensure that the charges, practices, classifications, and regulations for these services will be just, reasonable, and not unjustly or unreasonably discriminatory.

**a. Exclusionary Market Power**

53. Our assumption that Qwest continues to possess exclusionary market power raises the question whether it is necessary to apply dominant carrier regulation to any in-region, interstate, interLATA

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<sup>141</sup> See Qwest Petition at 15-16.

<sup>142</sup> See *supra* part III.D.4.

<sup>143</sup> *LEC Classification Order*, 12 FCC Rcd at 15804, para. 85, 15806-08, paras. 88-90, and at 15812-33, paras. 98-130.

<sup>144</sup> *AT&T Reclassification Order*, 11 FCC Rcd at 3313-14, paras. 81-82.

<sup>145</sup> See *infra* Parts III.E.1.c.iii, III.E.1.c.iv.

<sup>146</sup> See Letter from Melissa E. Newman, Vice President, Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-333, Attach. at 1 (filed Feb. 8, 2007) (Qwest Feb. 8, 2007 *Ex Parte* Letter).

<sup>147</sup> *LEC Classification Order*, 12 FCC Rcd at 15806-08, paras. 88-90; *AT&T Reclassification Order*, 11 FCC Rcd at 3291, para. 33.

telecommunications services that Qwest provides on an integrated basis to ensure that the charges, practices, classifications, or regulations in connection with those services are just, reasonable, and not unjustly or unreasonably discriminatory. We conclude that it is not. Dominant carrier regulation of Qwest's in-region, interstate, interLATA telecommunications services is not the most effective and cost-efficient way to address exclusionary market power concerns resulting from Qwest's control of any bottleneck access facilities that Qwest's competitors must access in order to provide competing services.<sup>148</sup> Indeed, the existing safeguards we discuss below and the additional safeguards we adopt in this Order address these concerns far more directly than would the application of dominant carrier regulation to Qwest's in-region, interstate, interLATA telecommunications services. Consistent with the *LEC Classification Order*, we conclude that, to the extent dominant carrier regulation addresses exclusionary market power, "the burdens imposed by such regulation outweigh[] its benefits."<sup>149</sup>

54. Although we recognize that the sunset of the section 272 structural safeguards has eliminated certain of the safeguards the Commission relied upon in the *LEC Classification Order*, other safeguards will continue to apply. In particular, Qwest still will be subject to: dominant carrier regulation of its access services, including price cap regulation of most telephone exchange and exchange access services;<sup>150</sup> the Commission's accounting and cost allocation rules and related reporting requirements;<sup>151</sup> equal access obligations under longstanding Commission precedent and section 251(g) of the Act;<sup>152</sup> section 251 obligations;<sup>153</sup> and the continuing general obligation to provide service on just, reasonable, and not unreasonably discriminatory rates, terms, and conditions pursuant to sections 201 and 202 of the Act.<sup>154</sup> In

<sup>148</sup> See *LEC Classification Order*, 12 FCC Rcd at 15762-63, para. 6 (concluding that "regulating BOC in-region interLATA affiliates as dominant carriers generally would not help to prevent improper allocation of costs, discrimination by the BOCs against rivals of their interLATA affiliates, or price squeezes by the BOCs or the BOC interLATA affiliates").

<sup>149</sup> *Id.*

<sup>150</sup> Qwest is not subject to price cap regulation for: (1) the exchange access services for which it has been granted phase II pricing flexibility; (2) certain services for which it was granted forbearance from dominant carrier regulation in the Omaha MSA; and (3) certain of its services that are provided pursuant to rate of return regulation. See *Access Charge Reform*, CC Docket Nos. 96-262, 94-1, 98-157, CCB/CPD File No. 98-63, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221 (1999) (*Pricing Flexibility Order*), *aff'd sub nom. WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001); see also 47 U.S.C. §§ 203(b), 204(a)(3); 47 C.F.R. §§ 61.38, 61.41, 61.58; *Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, CC Docket No. 96-187, Report and Order, 12 FCC Rcd 2170, 2182, para. 19, 2188, para. 31, 2191-92, para. 40, & 2202-03, para. 67 (1997); *Qwest Omaha Order*, 20 FCC Rcd at 19424, para. 15.

<sup>151</sup> For example, Qwest is required to file on an annual basis a cost allocation manual (CAM) describing how it allocates costs between regulated and nonregulated activities, and to have an independent auditor audit that CAM every two years. See 47 C.F.R. §§ 43.21(d), 64.901-905; see also 47 C.F.R. §§ 32.23(c), 32.5280. Qwest also is subject to certain reporting requirements under the Commission's Automated Reporting Management Information System (ARMIS). See *Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67, and 69 of the FCC's Rules)*, CC Docket No. 86-182, Report and Order, 2 FCC Rcd 5770 (1987) (*ARMIS Order*), *modified on recon.*, 3 FCC Rcd 6375 (1988) (*ARMIS Reconsideration Order*); see also 47 C.F.R. § 43.21.

<sup>152</sup> 47 U.S.C. § 251(g); *MTS and WATS Market Structure, Phase III*, Docket No. 78-72, Report and Order, 100 FCC 2d 860 (1985); *Investigation into the Quality of Equal Access Services*, Memorandum Opinion and Order, 60 Rad. Reg. 2d (P&F) 417, 419, 1986 WL 291752 (1986).

<sup>153</sup> 47 U.S.C. § 251.

<sup>154</sup> 47 U.S.C. §§ 201, 202.

addition, the nondiscrimination requirement in section 272(e)(1) of the Act and the imputation requirement in section 272(e)(3) of the Act (which we discuss in part III.E.1.c.ii, below)<sup>155</sup> continue to apply.<sup>156</sup> Finally, in order to address concerns that Qwest might attempt to raise rivals' costs by discriminating in the provision of special access services, we impose as a condition of this Order the obligation that Qwest comply with its commitment to implement a special access performance metrics plan.<sup>157</sup> We find that these continuing existing safeguards, along with the conditions we impose here, are adequate to prevent the exercise of exclusionary market power by Qwest.

**b. Specific Relief**

**i. Relief Granted**

55. The Commission grants Qwest the relief set forth below with respect to, and only with respect to, Qwest's provision, on an integrated basis, of in-region, interstate and international, interLATA telecommunications services. To the extent our predictive judgment regarding the state of competition proves incorrect, aggrieved parties may file appropriate petitions with the Commission and the Commission has the option of revisiting this forbearance ruling.<sup>158</sup> For the sake of clarity, we emphasize that we do not forbear from the application to Qwest of any rule that applies to carriers classified as nondominant in the provision of in-region, interstate or international, interLATA telecommunications services.

56. *Price Cap, Rate of Return, and Tariffing Forbearance for Qwest's Provision of In-region, Interstate and International, InterLATA Telecommunications Services.* In light of our analysis above, we find that, subject to the conditions set forth in part III.E.1.c, below, enforcement of certain of our price cap, rate of return, and tariffing rules with respect to Qwest's provision of in-region, interstate, interLATA telecommunications services on an integrated basis is not necessary to ensure that Qwest's charges,

<sup>155</sup> 47 U.S.C. § 272(e).

<sup>156</sup> We note that the safeguards adopted in the *Non-Accounting Safeguards* and the *Accounting Safeguards Orders* to implement these provisions also remain in effect.

<sup>157</sup> See *infra* Part III.E.1.c.i.

<sup>158</sup> See *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, WC Docket No. 05-281, Memorandum Opinion and Order, FCC 06-188, n.159 (rel. Jan. 30, 2007); *Federal-State Joint Board on Universal Service, Petition of TracFone Wireless, Inc. for Forbearance from 47 U.S.C. § 214(e)(1)(A) and 47 C.F.R. § 54.201(i)*, CC Docket No. 96-45, Order, 20 FCC Rcd 15095, 15099, para. 6, n.25 (2005) (stating that if the Commission's "predictive judgment proves incorrect and these conditions prove to be inadequate safeguards, then parties can file appropriate petitions with the Commission and the Commission has the option of reconsidering the forbearance ruling"); see also *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, 19 FCC Rcd 21496, 21509, para. 26, n.85 (2004) (*Broadband 271 Forbearance Order*), *aff'd sub nom. EarthLink, Inc. v. FCC*, 462 F.3d 1 (D.C. Cir. 2006); *Petition of SBC Communications Inc. for Forbearance from Structural Separation Requirements of Section 272 of the Communications Act of 1934, as Amended, and Request for Relief to Provide International Directory Assistance Services*, CC Docket No. 97-172, Memorandum Opinion and Order, 19 FCC Rcd 5211, 5223-24, para. 19, n.66 (2004) (stating in a forbearance decision that to the extent carriers believe, in the future, that circumstances have changed and discriminatory practices have emerged with respect to these particular routes, they are free to file petitions); *CellNet Communications, Inc. v. FCC*, 149 F.3d 429, 442 (6th Cir. 1998) (upholding the Commission's predictive judgment stating that "[i]f the FCC's predictions about the level of competition do not materialize, then it will of course need to reconsider its sunset provision in accordance with its continuing obligation to practice reasoned decision-making").

practices, classifications, or regulations in connection with those services are just, reasonable, and not unjustly or unreasonably discriminatory. Specifically: (1) Qwest will not be required to, and is in fact barred from, filing tariffs for in-region, interstate, interLATA telecommunications services pursuant to sections 61.31-.38 and 61.43 of our rules;<sup>159</sup> (2) Qwest will not be required to establish an “interexchange basket” pursuant to section 61.42(d)(4) of our rules,<sup>160</sup> to the extent that section 61.42(d)(4) would require the establishment of an interexchange basket for the integrated provision of interexchange services covered by this Order; and (3) we will forbear from applying section 61.28 of our rules to Qwest’s provision of in-region, international telecommunications services on an integrated basis to the extent that, and only to the extent that, Qwest would be treated as a dominant carrier under section 61.28 for no other reason than its provision, on an integrated basis, of in-region, international telecommunications services.<sup>161</sup> To the extent that Qwest otherwise would be treated as a dominant carrier under section 61.28, our forbearance action has no effect on that treatment.<sup>162</sup>

*57. Discontinuance and Streamlined Transfer of Control Forbearance.* In light of our analysis above, we find that, subject to the conditions set forth in part III.E.1.c, below, enforcement of certain of our discontinuance and streamlined transfer of control rules with respect to Qwest’s provision of in-region, interstate, interLATA telecommunications services on an integrated basis is not necessary to ensure that Qwest’s charges, practices, classifications or regulations in connection with those services are just, reasonable, and not unjustly or unreasonably discriminatory. Specifically, we forbear from applying sections 63.03, 63.19, 63.21, 63.23, and 63.60-.90 of our rules to Qwest’s provision of in-region, interstate, interLATA telecommunications services to the extent that, and only to the extent that, Qwest would be treated as a dominant carrier under these rules for no reason other than its provision of those services on an integrated basis.<sup>163</sup> To the extent that Qwest otherwise would be treated as a dominant carrier under these rules, that treatment shall continue.<sup>164</sup>

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<sup>159</sup> See 47 C.F.R. §§ 61.31-.38 (tariffing requirements for dominant carriers); *see also* 47 C.F.R. § 61.43 (requiring annual price cap filings). We also forbear from section 203 of the Act to the limited extent necessary to relieve Qwest of its section 61.31-.38 obligations, implementing that section of the Act, to file tariffs for in-region interexchange services it provides on an integrated basis and to prohibit Qwest from filing such tariffs. *See Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934*, CC Docket No. 96-61, Second Report and Order, 11 FCC Rcd 20730 (1996) (*Detariffing Order*); *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934*, CC Docket No. 96-61, Order on Reconsideration, 12 FCC 15014 (1997) (*Reconsideration Order*); *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934*, CC Docket No. 96-61, Second Order on Reconsideration and Erratum, 14 FCC Rcd 6004 (1999) (*Second Reconsideration Order*).

<sup>160</sup> 47 C.F.R. § 61.42(d)(4) (interexchange basket for services that are not classified as access services).

<sup>161</sup> 47 C.F.R. § 61.28 (tariffing requirements for dominant international carriers).

<sup>162</sup> *See infra* Part III.F (addressing Qwest’s in-region, international telecommunications services).

<sup>163</sup> *See* 47 C.F.R. § 63.03 (procedures for domestic transfer of control applications); 47 C.F.R. § 63.19 (procedures for discontinuing international services); 47 C.F.R. § 63.21 (conditions that apply to international section 214 authorizations); 47 C.F.R. § 63.23 (conditions that apply to resale-based international common carriers); 47 C.F.R. §§ 63.60-90 (definitions, rules, and procedures that apply to the discontinuance, reduction, outage, and impairment of services).

<sup>164</sup> Our forbearance with respect to section 63.03 extends only to those circumstances in which Qwest seeks to assign or transfer control of assets used solely for the purpose of providing in-region, interstate, interLATA

(continued....)

58. *Contract Filing and Reporting Forbearance.* In light of our analysis above, we find that, subject to the conditions set forth in part III.E.1.c, below, enforcement of section 43.51 of our rules with respect to Qwest's provision of in-region, interstate, interLATA telecommunications services on an integrated basis is not necessary to ensure that Qwest's charges, practices, classifications, or regulations in connection with those services are just, reasonable, and not unjustly or unreasonably discriminatory. Specifically, the Commission will forbear from applying section 43.51 of our rules to Qwest's provision of in-region, interstate, interLATA telecommunications services on an integrated basis to the extent that, and only to the extent that, Qwest would be treated as a dominant carrier under section 43.51 for no other reason than its provision of in-region, interstate, interLATA telecommunications services on an integrated basis.<sup>165</sup> To the extent that Qwest otherwise would be treated as a dominant carrier under section 43.51, that treatment shall continue.

## ii. Relief Denied

59. *Sections 214 (a), (c), and (d) and 272 of the Act.* The Commission does not forbear from the application of any provision of sections 214 or 272 of the Act. As an initial matter, the provisions of section 272 (other than those in section 272(e)) have sunset throughout Qwest's region,<sup>166</sup> and we need not forbear from the provisions that have sunset to allow Qwest to provide in-region, interstate, interLATA telecommunications services subject to nondominant carrier regulation, as Qwest requests in its petition. Second, although we forbear in part from the application of our discontinuance and streamlined transfer of control rules as they relate to dominant carriers,<sup>167</sup> our rules implementing sections 214(a), (c), and (d) also include discontinuance rules and transfer of control rules for nondominant carriers from which we do not forbear. Finally, enforcement of sections 214(a), (c), and (d) and section 272(e) remains necessary to ensure that the charges, practices, classifications, and regulations in connection with Qwest's provision, on an integrated basis, of in-region, interstate or international, interLATA telecommunications services are just, reasonable, and not unjustly or unreasonably discriminatory. Denying Qwest relief from the application of sections 214(a), (c), and (d) and section 272(e) also does not preclude Qwest from operating as it proposes in its petition because those provisions do not prevent Qwest from providing in-region, interstate, interLATA telecommunications services on an integrated basis subject to nondominant carrier regulation.<sup>168</sup>

60. *Price Cap, Rate of Return, and Tariffing Forbearance for Qwest's Provision of In-region, Interstate, InterLATA Telecommunications Services.* We need not forbear from the application of the other dominant carrier price cap, rate of return, and tariffing rules identified by Qwest (*i.e.*, sections 61.41, 61.45, 61.46-.49, 61.58-.59, 65.1(b)(1), 65.1(b)(3), and 65.600 of our rules) for Qwest to be able to

(Continued from previous page) \_\_\_\_\_

telecommunications services or to transfer control of an affiliate that does not jointly own any assets with another entity that uses such assets to provide services that are subject to dominant carrier regulation.

<sup>165</sup> 47 C.F.R. § 43.51 (filing of carrier contracts and concessions).

<sup>166</sup> See *supra* n.28.

<sup>167</sup> See *supra* para. 57.

<sup>168</sup> We also do not forbear from the application of sections 63.10 and 63.18 of our rules, because the provisions in these rules that deal with dominant carriers apply only to carriers classified as dominant based on their affiliations with foreign carriers. We therefore do not need to forbear from these rules for Qwest to operate as it proposes to operate.

operate as it proposes in its petition.<sup>169</sup> This is because our forbearance from sections 61.31-.38<sup>170</sup> obviates the need for Qwest to file tariffs for any in-region, interstate, interLATA telecommunications services it chooses to provide on an integrated basis, and, as described below, the Commission treats, and will continue to treat, the costs and revenues associated with Qwest's provision of in-region, interstate, interLATA telecommunications services on an integrated basis as nonregulated for accounting purposes.<sup>171</sup> For these same reasons, we do not forbear from the application of section 61.42(d)(4), except to the extent described in paragraph 56 above.<sup>172</sup>

61. *Contract Filing and Reporting Requirements.* We do not forbear from two of the contract filing and reporting rules identified by Qwest,<sup>173</sup> sections 43.21 and 43.43 of our rules.<sup>174</sup> These rules are unrelated to the provision of the services for which Qwest seeks relief. Qwest is subject to them because it is an incumbent LEC, not because it is classified as dominant in the provision of any service. These rules are, in other words, carrier-specific, not service-specific, and forbearance from them based on an analysis of Qwest's in-region, interstate and international, interLATA telecommunications services is unwarranted.

62. *Other Matters.* On December 7, 2006, Qwest filed an *ex parte* presentation asserting that, under section 32.23(a) of the Commission's rules, in-region, interLATA telecommunications services provided on an integrated basis should be treated as *regulated* for accounting purposes.<sup>175</sup> Contrary to Qwest's position,<sup>176</sup> the condition in section 32.23(a) of the Commission's rules upon which Qwest relies applies only "until such time" as the Commission decides the accounting treatment applicable to the activities in question.<sup>177</sup> Here, the Commission has explicitly determined that the BOCs' in-region,

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<sup>169</sup> See 47 C.F.R. § 61.41 (general price cap requirements); 47 C.F.R. § 61.45 (adjustments to the price cap index); 47 C.F.R. §§ 61.46-.49 (specific price cap implementation rules); 47 C.F.R. §§ 61.58-.59 (tariff notice requirements for price cap carriers); 47 C.F.R. § 65.1(b)(1) (application of rate of return prescription procedures and methodologies for interstate access services); 47 C.F.R. § 65.1(b)(3) (application of rate of return prescription procedures and methodologies for price cap carrier offering rate of return services); 47 C.F.R. § 65.600 (reporting requirement for carriers subject to rate of return regulation).

<sup>170</sup> 47 C.F.R. §§ 61.31-.38 (tariffing requirements for dominant carriers).

<sup>171</sup> See *infra* para. 62.

<sup>172</sup> Our forbearance action thus does not relieve Qwest of its obligation to establish or maintain an "interexchange basket" for services other than those covered by this Order.

<sup>173</sup> Qwest Reply at 11 (citing 47 C.F.R. §§ 43.21, 43.43).

<sup>174</sup> 47 C.F.R. § 43.21 (affiliate transactions); 47 C.F.R. § 43.43 (reports of proposed changes in depreciation rates). But see *supra* para. 58 (granting limited forbearance from section 43.51).

<sup>175</sup> See Qwest Dec. 7, 2006 *Ex Parte* Letter at 8. Qwest did not, in its petition initiating this proceeding, seek forbearance from any of the Commission's rules with respect to the accounting treatment of in-region, interLATA telecommunications services provided on an integrated basis. See Qwest Petition, *passim*.

<sup>176</sup> See Qwest Dec. 7, 2006 *Ex Parte* Letter at 8 (arguing that "in accordance with Section 32.23 of the Commission's rules, in-region [interexchange] services should be accounted for as regulated services when such services are provided on an integrated basis by Qwest's LEC"). We construe Qwest's *Ex Parte* analysis to refer only to in-region, interexchange or interLATA telecommunications services.

<sup>177</sup> See 47 C.F.R. § 32.23(a) (specifying that "[a]ctivities that have been deregulated at the interstate level, but not preemptively deregulated, will be classified for accounting purposes as regulated activities *until such time as this Commission decides otherwise*") (emphasis added).

interLATA telecommunications services (services that Qwest currently offers through its section 272 separate affiliates) are to be treated as nonregulated for accounting purposes.<sup>178</sup> This treatment is consistent with the accounting treatment of incidental and out-of-region interLATA services provided on an integrated basis.<sup>179</sup> Accordingly, absent a determination to the contrary, the provision of in-region, interLATA telecommunications services on an integrated basis will continue to be treated as nonregulated for accounting purposes.<sup>180</sup> We note that Qwest does not address the policy concerns the Commission previously identified with respect to the treatment of in-region, interLATA telecommunications services provided on an integrated basis as regulated for accounting purposes.<sup>181</sup> Nor do Qwest's summary assertions late in this proceeding adequately address concerns regarding potential negative implications of regulated accounting treatment on state ratemaking.<sup>182</sup>

**c. Safeguards**

63. The relief we grant in this Order is conditioned on Qwest's compliance with the following safeguards, which will apply to the extent Qwest chooses to provide in-region, interstate, interLATA telecommunications services on an integrated basis through the BOC or through another affiliate that is not a section 272 separate affiliate. These safeguards include: (1) Qwest's commitment to implement special access performance metrics to prevent non-price discrimination in the provision of special access services;

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<sup>178</sup> See *Accounting Safeguards Order*, 11 FCC Rcd at 17620, para. 176 (directing that the BOCs treat services provided by their section 272 interLATA affiliates, such as affiliates providing in-region services, as nonregulated activities for accounting purposes). The *Accounting Safeguards Order* does not limit the applicability of nonregulated accounting treatment for services provided by section 272 separate affiliates to specific services.

<sup>179</sup> See *Accounting Safeguards Order*, 11 FCC Rcd at 17573, para. 76 (noting that treating out-of-region and certain types of incidental interLATA services as nonregulated for accounting purposes will achieve greater accuracy in safeguarding against cross-subsidization and will lessen the chance that costs associated with such services are inadvertently assigned to a local exchange or exchange access category). Contrary to Qwest's assertions, see Qwest Dec. 7, 2006 *Ex Parte* Letter at 8-9, n.19, the Commission's decision in the *Wireline Broadband Internet Access Services Order* to treat as regulated the telecommunications transmission component of the wireline broadband Internet access services provides no support for treating Qwest's provision of in-region, interLATA telecommunications services on an integrated basis as a regulated activity. See *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14924, para. 128. As Qwest recognizes, the Commission found in that Order that the burdens of requiring nonregulated treatment for the broadband transmission services at issue in that Order outweighed the benefits. See Qwest Dec. 7, 2006 *Ex Parte* Letter at 8-9, n.19 (citing *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14924-26, paras. 129-35). Those transmission services had been treated as regulated up to that time, and thus it would have been burdensome to change the accounting treatment for them. Here, Qwest's interLATA telecommunications services are treated as nonregulated today, and continuing to treat them as nonregulated when integrated maintains the accounting status quo, consistent with the Commission's rules and the Commission's approach in the *Wireline Broadband Internet Access Services Order*.

<sup>180</sup> In its CAM updates filed pursuant to 47 C.F.R. § 64.903(b), Qwest will describe how it will comply with part 64 in allocating costs and revenues from these services between its regulated and nonregulated operations.

<sup>181</sup> *Accounting Safeguards Order*, 11 FCC Rcd at 17572-73, para. 74 (concluding that "if interLATA telecommunications services . . . that may be provided by incumbent local exchange carriers on an integrated basis, were treated as regulated for accounting purposes, our part 64 rules would not prevent any improper cost allocations that may occur between local exchange and exchange access services and these interLATA telecommunications services"); *id.* at 17573, para. 76 (stating that "the Part 36 jurisdictional separations process and the Part 69 access charge process were not designed to prevent subsidization of competitive telecommunications services by subscribers to exchange and exchange access services").

<sup>182</sup> See Qwest Dec. 7, 2006 *Ex Parte* Letter at 8, n.18.

(2) an imputation requirement to help us evaluate whether Qwest engages in price discrimination in the provision of these services; (3) Qwest's commitment to continue offering certain calling plans to protect residential customers who make few interstate, interLATA calls; and (4) Qwest's commitment to ensure that its subscribers continue to receive in their bills the monthly usage information that they may need to make cost-effective decisions concerning alternative long-distance plans. We will carefully monitor Qwest's compliance with this condition and will not hesitate to take appropriate remedial action if necessary. We also retain the authority to adjust these safeguards in the future as appropriate to reflect any competitive changes that might occur in the markets for interLATA telecommunications services within Qwest's region.

**i. Special Access Performance Metrics**

64. As part of the Commission's implementation of the section 272 structural safeguards, Qwest has implemented special access performance metrics designed to ensure that Qwest does not engage in non-price discrimination in its provision of special access services.<sup>183</sup> Once Qwest chooses to provide in-region, interstate or international, interLATA telecommunications services on an integrated basis, those metrics would cease to be available. Therefore, Qwest has committed to implement special access metrics, detailed in Appendix C, which are similar to those imposed on AT&T and Verizon under the terms of the *SBC/AT&T* and *Verizon/MCI Merger Orders*.<sup>184</sup> The metrics Qwest has committed to implement address order taking, provisioning, and maintenance and repair of Qwest's DS0, DS1, DS3, and OCn services (collectively, covered special access services) and are designed to help ensure that Qwest provides special access services to unaffiliated entities in a non-discriminatory manner.<sup>185</sup> The information Qwest records and reports to the Commission under these metrics will provide the Commission and other interested parties with reasonable tools to monitor Qwest's performance in providing these special access services to itself and its competitors.<sup>186</sup>

65. Qwest will implement these metrics to the extent it provides one or more of the covered special access services to Qwest's own operations or to third parties. Qwest will provide the Commission with its performance measurement results on a quarterly basis. Those results shall consist of data collected in

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<sup>183</sup> Qwest's implementation of these metrics is reviewed as part of the biennial audits. Qwest's current biennial audit period began January 2, 2006, and will run until January 2, 2008 or until Qwest ceases providing in-region, interLATA telecommunications services through a section 272 separate affiliate, whichever occurs earlier.

<sup>184</sup> See Letter from Melissa E. Newman, Vice President, Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-333 (filed Feb. 9, 2007) (Qwest Feb. 9, 2007 *Ex Parte* Letter); see also *SBC/AT&T Order*, 20 FCC Rcd at 18415-21 (App. F, Attach. A); *Verizon/MCI Order*, 10 FCC Rcd at 18563-69 (App. G, Attach. A).

<sup>185</sup> These metrics thus are consistent with Qwest's obligation under section 272(e)(1) to "fulfill any requests from an unaffiliated entity for telephone exchange service and exchange access within a period no longer than the period in which it provides such telephone exchange service and exchange access to itself or to its affiliates." 47 U.S.C. § 272(e)(1).

<sup>186</sup> For example, the "Firm Order Confirmation Timeliness" metric should provide data measuring whether Qwest confirms orders for the covered special access services within nondiscriminatory time frames. Similarly, the "Percent Installation Services Met" and "New Installation Trouble Report Rate" metrics should measure whether Qwest provisions these special access services to itself and its competitors in nondiscriminatory time frames and with nondiscriminatory levels of quality. In addition, the "Failure Rate/Trouble Rate" metric should measure whether Qwest provides its competitors with the same level of special access quality as that provided to its own operations. Finally, the "Average Repair Interval/Mean Time to Restore" metric should measure whether Qwest repairs covered special access services in a nondiscriminatory manner.

accordance with the metrics set forth in Appendix C to this Order. Such reports will be provided in an Excel spreadsheet format and will be designed to demonstrate the Qwest BOCs' monthly performance in delivering the covered interstate special access services within each of the states in Qwest's region. These data will be reported on an aggregated basis for interstate special access services as identified in the attachment. Qwest will provide performance measurement results (broken down on a monthly basis) for each quarter to the Commission by the 45th day after the end of the quarter with the exception of the New Installation Trouble Report Rate, which will be provided by the 60th day after the end of the quarter. Qwest will implement these metrics for the first full quarter following the effective date of this Order.<sup>187</sup> This commitment shall terminate on the earlier of: (i) 30 months and 60 days after the beginning of the first full quarter following the effective date of this Order; or (ii) the effective date of a Commission order adopting performance metrics for interstate special access services.

66. We conclude that the metrics and the associated reporting requirements that Qwest has committed itself to implement adequately address the parties' concerns about Qwest's incentive and ability to discriminate in its provisioning of special access services in order to impede competition in the market for interstate, interLATA telecommunications services.<sup>188</sup> At the same time, these metrics should not in any way impede Qwest's ability to compete.<sup>189</sup>

## ii. Imputation

67. We also provide guidance to Qwest regarding its compliance with its ongoing obligations under section 272(e)(3) of the Act.<sup>190</sup> That provision requires each BOC that uses access to its local network for

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<sup>187</sup> We anticipate that Qwest's performance under these metrics will be evaluated in connection with the CAM review process.

<sup>188</sup> See, e.g., Level 3 Comments at 10 (stating that Level 3 and other buyers find it largely impossible to find viable alternatives to incumbent LEC special access services); AdHoc Reply at 8 (stating that enterprise networks are dependent upon Qwest's access services); see also *Triennial Review Order*, 18 FCC Rcd at 17012, para. 45 (recognizing that special access services provide competitors with wholesale inputs that they typically combine with other competitively provisioned services or facilities to build complete services for sale to retail customers), corrected by Errata, 18 FCC Rcd 19020 (2003), *aff'd in part, remanded in part, vacated in part*, *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*), cert. denied sub nom. *National Ass'n Regulatory Util. Comm'rs v. United States Telecom Ass'n*, 534 U.S. 925 (2004).

<sup>189</sup> AdHoc maintains that the most effective measure for preventing potential price squeezes for access services is to ensure special access prices are at competitive levels. See AdHoc Reply at 25-26. Imposing dominant carrier regulation on Qwest in its provision of in-region, interstate and international, interLATA telecommunications services will not address AdHoc's concerns. Rather, the targeted safeguards adopted in this Order specifically address Qwest's control over bottleneck access facilities in its region. Accordingly, we find that, in comparison to dominant carrier regulation of those services, the safeguards adopted in this Order, together with other existing safeguards, provide a cost-effective means of limiting Qwest's ability to use any market power it has in the local exchange and exchange access markets to impede competition in the enterprise market.

<sup>190</sup> 47 U.S.C. § 272(e)(3). Imputation is an accounting and, at times, ratemaking device that reflects a policy decision to depart from historical costs in recognizing intra-company transactions. In the context of access services, this Commission and state commissions have long recognized the potential for LECs to use their control over their local networks to impede competition in services for which local network access is a needed input. See, e.g., *Application of Access Charges to the Origination and Termination of Interstate, IntraLATA Services and Corridor Services*, Memorandum Opinion and Order, FCC 85-172, 1985 FCC Lexis 3510, para. 9 & n.22 (Apr. 12, 1985) (*Corridor Services Order*) (requiring that LECs impute access charges to themselves in calculating their interstate, intraLATA toll rates); see also *1998 Biennial Regulatory Review – Part 61 of the Commission's Rules and Related Tariffing Requirements*, CC Docket No. 98-131, Report and Order and First Order on

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the provision of its own services to “impute to itself . . . an amount for access . . . that is no less than the amount charged to any unaffiliated interexchange carriers for such access.”<sup>191</sup> Consistent with this requirement, Qwest acknowledges that it must impute to itself, at its tariffed rates, charges for access services used to provide interLATA services.<sup>192</sup> Qwest will revise its CAM filed pursuant to section 64.903 of our rules to include its imputation methodology, and the revised CAM will be subject to public comment.<sup>193</sup>

68. Qwest indicates that a significant reason underlying its desire to provide in-region, interstate, interLATA telecommunications services on an integrated basis is to realize the efficiencies of an integrated network over time.<sup>194</sup> This integration will over time change both how Qwest’s in-region, interLATA network interconnects with its local network and the degree to which some facilities are jointly used to provide both local and interLATA services. The degree of integration does not alter Qwest’s imputation obligation under section 272(e)(3).<sup>195</sup> In order to ensure Qwest’s continued compliance with this obligation, we direct Qwest to continue to impute to itself its tariffed rates for access, including access provided over joint-use facilities, where it sells comparable access to unaffiliated interexchange carriers.<sup>196</sup> We also direct Qwest to modify its CAM as necessary to ensure that its imputation methodology remains consistent with section 272(e)(3) as Qwest changes the degree to which it integrates its interLATA and BOC operations.<sup>197</sup>

69. Finally, under our rules, amounts imputed to Qwest’s in-region, interLATA services pursuant to section 272(e)(3) must be debited to account 32.5280,<sup>198</sup> which includes nonregulated operating revenue.<sup>199</sup> To facilitate transparency of Qwest’s imputation of integrated, in-region, interLATA costs, we

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Reconsideration, 14 FCC Rcd 12293, 12312, para. 53 (1999) (requiring that price cap LECs offering interexchange services impute to themselves the same access charges that they impose on interexchange carriers).

<sup>191</sup> 47 U.S.C. § 272(e)(3); *see also Accounting Safeguards Order*, 11 FCC Rcd at 17577, para. 87 (“the BOC must impute to its integrated operations the highest rate paid for such access by unaffiliated carriers”). This safeguard remains applicable to Qwest’s provision of in-region, interLATA telecommunications services. *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 22035-36, para. 270.

<sup>192</sup> *See* Qwest Dec. 7, 2006 *Ex Parte* Letter at 9.

<sup>193</sup> 47 C.F.R. § 64.903 (CAM requirements).

<sup>194</sup> *See* Letter from Melissa E. Newman, Vice President, Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-333, Attach. at 3-6 (filed July 26, 2006).

<sup>195</sup> 47 U.S.C. § 272(e)(3). The section 272(e)(3) obligation to impute an amount for access “that is no less than the amount charged to any unaffiliated interexchange carriers for such service” is unqualified; it does not vary with Qwest’s network configuration or how Qwest provides access to itself. *See id.*

<sup>196</sup> *Accounting Safeguards Order*, 11 FCC Rcd at 17577, para. 87 (stating that “where a BOC charges different rates to different unaffiliated carriers for access to its telephone exchange service, the BOC must impute to its integrated operations the highest rate paid for such access by unaffiliated carriers”).

<sup>197</sup> 47 C.F.R. § 64.903(b) (accuracy of CAMs).

<sup>198</sup> 47 C.F.R. § 32.5280 (nonregulated operating revenue).

<sup>199</sup> 47 C.F.R. § 32.5280; *Accounting Safeguards Order*, 11 FCC Rcd at 17576-77, para. 86; *see also* 47 C.F.R. § 64.901(b)(1) (specifying that tariffed services, such as exchange access services, provided to a nonregulated

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require Qwest, as a condition of this Order, to include the imputation charges it debits to account 32.5280 in its ARMIS filings, accompanied by an explanatory footnote for each line item identifying the amount imputed.<sup>200</sup> This requirement should pose at most a minimal additional burden to Qwest because Qwest already records imputation charges in a subsidiary record account for revenues derived from regulated services treated as nonregulated for federal accounting purposes,<sup>201</sup> and already must file ARMIS reports.<sup>202</sup>

70. We conclude that such imputation requirements adequately address the parties' concerns about Qwest's incentives and ability to use its pricing of special access services to impede competition in the provision of in-region, interstate, intraLATA telecommunications services.<sup>203</sup> At the same time, imputation requirements should not in any way impede Qwest's ability to compete. Instead, they should give Qwest, Qwest's special access services customers, and the Commission meaningful information for evaluating whether Qwest's imputation practices and procedures comply with section 272(e)(3). We also believe that, in comparison with dominant carrier regulation, these imputation requirements provide a less costly but more effective method of assuring that Qwest will not discriminate between its own operations and its competitors in the pricing of special access services.

### iii. Low Volume Usage Plans

71. As discussed above, although we find that Qwest generally lacks classical market power in the provision of interstate, interLATA telecommunications services, we are concerned that Qwest customers who make few long distance calls and who do not also subscribe to wireless or broadband Internet access service may have fewer competitive choices among interstate, interLATA long distance providers and may not be able to avoid the impact of a price increase by engaging in usage substitution. To address this concern, Qwest has committed for two years to freeze the per-minute prices for two calling plans that it currently offers which are tailored to these customers' needs, and not to increase the monthly fee that applies to one of these plans by more than one dollar.<sup>204</sup> We find that this commitment helps protect against any classical market power that Qwest may have in relation to these customers in its provision of

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operation must be charged to nonregulated activities at the tariffed rates and credited to the regulated revenue account for that service).

<sup>200</sup> These data values with explanatory footnotes are to be provided in FCC Report 43-01, ARMIS Annual Summary Report, Table I, row 1045, columns (b) and (c); FCC Report 43-02, ARMIS USOA Report, Table I-1, row 5280, column (b); and in FCC Report 43-03, ARMIS Joint Cost Report, Table I, row 5280, columns (b), (d), and (j).

<sup>201</sup> See 47 C.F.R. § 32.5280(c) (specifying that separate subsidiary record categories be maintained for nonregulated revenues).

<sup>202</sup> See, e.g., *ARMIS Order*, 2 FCC Rcd at 5772, para. 22; see also 47 C.F.R. § 43.21.

<sup>203</sup> See, e.g., AdHoc Reply at 8 (stating that enterprise networks are dependent upon Qwest's access services); Level 3 Comments at 9-13.

<sup>204</sup> Qwest Feb. 8, 2007 *Ex Parte* Letter, Attach. at 1. Specifically, for 24 months after this Order becomes effective, Qwest commits to freeze the per minute price of both its *Managed Long Distance Plan* (\$0.18 per minute; no monthly fee; predetermined monthly limit of \$20.00) and its *15 Cent Single Rate Plan* (\$0.15 per minute, monthly fee of \$0.99). In addition, Qwest commits for the same period of time to charge no monthly fee for its *Managed Long Distance Plan* and not to raise the monthly fee for its *15 Cent Single Rate Plan* by more than \$1.00. *Id.*, nn.3-4.

interstate, interLATA telecommunications services and therefore helps ensure that these customers receive those services at just and reasonable charges within the meaning of section 10(a)(1). Moreover, we find that this condition provides more effective and less costly protection than applying dominant carrier regulation to Qwest's in-region, interstate, interLATA telecommunications services.<sup>205</sup> We accordingly make Qwest's adherence to this commitment a condition of our grant of forbearance.

#### iv. Monthly Usage Information

72. We also are concerned that long distance consumers need adequate information regarding their monthly usage in order to make informed choices among alternative long-distance calling plans. To address this concern, Qwest has committed to continue to provide, for at least two years, the same thorough monthly usage information that it currently provides to all residential long distance customers, including customers who take bundled long distance plans.<sup>206</sup> Again, we find that this commitment helps protect against any classical market power that Qwest may have in relation to these customers in its provision of interstate, interLATA telecommunications services, and we make Qwest's adherence to it a condition of our grant of forbearance. We also find that this condition will help ensure just and reasonable charges within the meaning of section 10(a)(1). Moreover, we find that this condition is likely to be more effective and less costly than applying dominant carrier regulation to Qwest's in-region, interstate, interLATA telecommunications services.

### 2. Section 10(a)(2) – Protection of Consumers

73. Section 10(a)(2) of the Act requires us to determine whether dominant carrier regulation of Qwest in its provision, on an integrated basis, of in-region, interstate long distance services is necessary to protect consumers.<sup>207</sup> Qwest argues that, as a result of the level of competition in its region, application of dominant carrier rules is unnecessary to protect consumers.<sup>208</sup> For reasons similar to those given in part III.E.1, we conclude that these regulations are not necessary for the protection of consumers. More specifically, we find that, because Qwest lacks classical market power in the provision of in-region, interstate, interLATA telecommunications services, it rationally would not act in a way that was inconsistent with the best interests of consumers. If, for example, it attempted to raise the prices or reduce the quality of its in-region, interstate, interLATA telecommunications services, Qwest would simply lose

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<sup>205</sup> In this regard, we agree with the New Jersey Ratepayer Advocate that customers need transparency in pricing to ensure that they choose the carrier that best suits their needs. *See* New Jersey Ratepayer Advocate Comments at 12. We reject, however, the New Jersey Ratepayer Advocate's argument that we should apply our dominant carrier tariff rules to Qwest's interstate long distance services in order to protect those consumers who make relatively few long distance calls. *Id.* at 14. To the extent that additional safeguards for these consumers are desirable, we disagree that dominant carrier tariff regulation is a necessary or appropriate regulatory response to this concern. *See id.*; New Jersey Ratepayer Advocate Reply at 6-7. Instead, we find that Qwest's commitments offering low-cost per-minute plans that are appropriate for such customers and, as discussed *infra* in Part III.E.1.c.iv, to continue providing informative invoices detailing long distance usage, will address this concern.

<sup>206</sup> Qwest Feb. 8, 2007 *Ex Parte* Letter, Attach. at 1. Qwest will provide the same usage information to all of its residential consumers of interstate, interexchange services, including new and bundled offerings. Specifically, Qwest will provide the following usage information for in-region, interLATA calls: the date of the call, the time of the call, the place called, the number called, the duration of the call, and amount charged for the call. *Id.*, n.5.

<sup>207</sup> 47 U.S.C. § 10(a)(2).

<sup>208</sup> Qwest Petition at 16.

market share as consumers shifted to other providers.<sup>209</sup> Moreover, while we assume that Qwest still possesses exclusionary market power as a result of its control of bottleneck facilities, we find that existing safeguards and the conditions set forth above are adequate to address this concern. Accordingly, based on our analysis of Qwest's market power and other factors discussed above, we find that the Commission's dominant carrier requirements are not necessary to protect consumers.

74. Moreover, with respect to the concerns discussed above,<sup>210</sup> relating to Qwest residential customers that either make relatively few long distance calls or that lack sufficient monthly usage information, we find that the conditions we adopt today are adequate to address these issues. Specifically, we take comfort in Qwest's commitments to continue providing detailed monthly usage information to all residential customers who take Qwest's long distance plans, and to continue offering plans that have either a nominal monthly charge or none at all, and are thus cost-effective for customers who make relatively few long distance calls. Finally, we are not forbearing from other rules and obligations currently applicable to Qwest's interstate, interLATA telecommunications services, including those related to 911, emergency preparedness, customer privacy, or universal service. Accordingly, we find that the application of dominant carrier rules described in this Order to any interstate long distance service that Qwest chooses to provide on an integrated basis is not necessary to protect customers and thus, that section 10(a)(2) is satisfied.

### 3. Section 10(a)(3) – Public Interest

75. We further find that, subject to the safeguards set forth in part III.E.1.c of this Order, it serves the public interest to forbear from imposing dominant carrier regulation on Qwest in its provision of in-region, interstate, interLATA telecommunications services on an integrated basis. In making this determination, we consider whether forbearance from enforcing the provisions at issue “will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services.”<sup>211</sup> Although we assume that Qwest continues to possess market power in the provision of local exchange and exchange access services within its region, we find that the burdens imposed by dominant carrier regulation outweigh the potential benefits in this case. The factors upon which we base our conclusions above also convince us that granting Qwest relief from dominant carrier regulation for its interstate, interLATA telecommunications services is in the public interest and will help promote competitive market conditions and enhance competition among providers of telecommunications services as contemplated by section 10(b).

76. As previously discussed, under our current rules, Qwest faces the unappealing choice between two alternative regulatory regimes, both of which impose significant costs on Qwest itself and on society in general.<sup>212</sup> Qwest can either provide its in-region, interstate, interLATA telecommunications services on a nondominant carrier basis through a section 272 separate affiliate, or it can provide these services on an integrated basis, subject to dominant carrier regulations (including rate regulation and tariff-filing requirements). Based on the record before us, we conclude that, as applied to Qwest, both of these regulatory regimes impose costs that exceed their benefits.

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<sup>209</sup> Cf. *Competitive Carrier First Report and Order*, 85 FCC 2d at 31, para. 88 (noting that, if a carrier lacking market power imposed “unreasonably high rates” or “unreasonable terms or conditions,” it would lose market share as consumers shifted to competitors).

<sup>210</sup> See *supra* Parts III.E.1.c.3, III.E.1.c.4.

<sup>211</sup> 47 U.S.C. § 160(b).

<sup>212</sup> See *supra* para. 9.

77. If Qwest decides to provide interstate, interLATA telecommunications services through a section 272 separate affiliate, then it will have to forego the economies of scope and scale that its competitors are able to realize. For example, providing interstate, interLATA telecommunications services through a section 272 affiliate requires Qwest, *inter alia*, to operate independently of the BOC and maintain separate officers, directors, and employees from the BOC.<sup>213</sup> These restrictions are inefficient not only because they impose additional costs on Qwest (such as requiring duplicative facilities), but also because they prevent Qwest from taking advantage of the economies of scope and scale associated with integrated operation. These restrictions may also prevent Qwest and the affiliates from quickly responding to technological and marketplace developments.<sup>214</sup> As a general matter, these restrictions and their associated costs make Qwest a less effective competitor in the market.

78. On the other hand, if Qwest chooses to provide interstate, interLATA telecommunications services on an integrated basis, it would be subject to dominant carrier regulation, which imposes its own significant costs and burdens, including the costs associated with dominant carrier price regulation, tariff-filing requirements, and reporting requirements.<sup>215</sup> As the Commission recognized in the *LEC Classification Order*, these regulatory requirements would restrict Qwest's ability to respond to competitors' pricing and product initiatives, and would give competitors advance notice of Qwest's own pricing plans and new products.<sup>216</sup> By impeding Qwest's ability to compete, these requirements also could dampen competition. The relief we grant Qwest today is narrowly tailored to allow it to take advantage of the economies associated with integration and avoid the unnecessary costs and burdens of the existing regulatory regimes, while continuing to comply with the obligations described herein. It also should result in increasing competition in the markets for interstate, interLATA telecommunications services.

79. Moreover, as discussed above, we find that dominant carrier regulation is neither necessary to ensure that "charges, practices, classifications, or regulations ... are just and reasonable and not unjustly or unreasonably discriminatory," nor to protect consumers. Because we find that Qwest lacks classical market power in the provision of in-region, interstate, interLATA telecommunications services and that existing safeguards and the safeguards set forth in part III.E.1.c adequately address any ability Qwest might have to raise rivals' costs, we conclude that imposing dominant carrier regulation on Qwest's provision of interstate, interLATA telecommunications services would realize few benefits. We further conclude that any benefits that might derive from imposing dominant carrier regulation on these services are far outweighed by the costs associated with such regulation. Accordingly, we find that it is in the public interest to forbear to the extent described above. Moreover, as discussed above, we find that forbearance will promote competitive market conditions by freeing Qwest to compete and innovate in the provision of interstate, interLATA telecommunications services.

80. Finally, the targeted safeguards set forth in this Order will place less of a burden on Qwest than would dominant carrier regulation and will better enable Qwest to compete in the interstate long

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<sup>213</sup> See 47 U.S.C. § 272(b); see generally *Accounting Safeguards Order*, 11 FCC Rcd 17539; *Non-Accounting Safeguards Order*, 11 FCC Rcd 21905.

<sup>214</sup> Cf. *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14895, para. 79.

<sup>215</sup> Qwest Jan. 16, 2007 *Ex Parte* Letter at 7-9; see also *LEC Classification Order*, 12 FCC Rcd at 15806-08, paras. 88-90.

<sup>216</sup> See *LEC Classification Order*, 12 FCC Rcd at 15806-08, paras. 88-90; see also Qwest Jan. 16, 2007 *Ex Parte* Letter at 6-7.

distance market within its region.<sup>217</sup> Accordingly, we conclude that forbearance from applying our dominant carrier rules to Qwest's in-region, interstate, interLATA telecommunications services is consistent with the public interest and therefore satisfies the requirements of section 10(a)(3).

#### F. International Services

81. Consistent with the Commission's conclusions in the *LEC Classification Order*, we find no practical distinctions between Qwest's incentive and ability to use any in-region market power in its provision of international and interstate, interLATA telecommunications services.<sup>218</sup> Therefore, as a general matter, we forbear from applying dominant carrier regulation to Qwest's in-region provision of international services to the same extent that we forbear from applying those requirements to Qwest's in-region provision of domestic interstate services. We do not forbear, however, from our dominant carrier rules that apply specifically to United States carriers that provide international telecommunications services.<sup>219</sup> For example, to the extent that Qwest becomes affiliated, within the meaning of section 63.09 of our rules, with a foreign carrier that has the ability to discriminate against Qwest's rivals through control of bottleneck services or facilities in a foreign destination market,<sup>220</sup> Qwest will continue to be presumptively classified as dominant under section 63.10 of our rules and subject to the safeguards in that rule, which apply to carriers that we classify as dominant based on a foreign carrier affiliation.<sup>221</sup> Thus, our framework for addressing issues raised by the provision of international services, either by Qwest or by a Qwest affiliate, will remain in effect.

#### IV. ORDERING CLAUSES

82. Accordingly, IT IS ORDERED that, pursuant to sections 4(i), 4(j), 10, 201, 202, 203, 214, and 272, of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 160, 201, 202, 203, 214, and 272, the Petition for Forbearance that was filed on November 22, 2005 by Qwest Communications International Inc. IS GRANTED to the extent set forth herein and SUBJECT TO THE CONDITIONS set forth herein and otherwise IS DENIED.

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<sup>217</sup> See *LEC Classification Order*, 12 FCC Rcd at 15806-08, paras. 88-90; see also Qwest Jan. 16, 2007 *Ex Parte* Letter at 6-7.

<sup>218</sup> *LEC Classification Order*, 12 FCC Rcd at 15838, para. 138.

<sup>219</sup> 47 C.F.R. § 63.10 (regulatory classification of United States international carriers); see *LEC Classification Order*, 12 FCC Rcd at 15838-39, para. 139 (preserving rules designed to address the incentive and ability of a foreign carrier to discriminate against the rivals of its United States affiliate).

<sup>220</sup> We are not aware of any filings made by Qwest or by a Qwest affiliate, pursuant to section 63.11 or section 63.18 of our rules, notifying the Commission that Qwest is affiliated with a foreign carrier that we then determined to possess market power in a foreign country. Cf. Letter from Timothy M. Boucher, Qwest Corporate Counsel, to Marlene H. Dortch, Secretary, Federal Communications Commission, at 1, (filed Jan. 22, 2007) (Qwest Jan. 22, 2007 *Ex Parte* Letter) (stating that Qwest is not affiliated with any foreign carrier that is a monopoly provider of telecommunications services in a relevant market in any destination country).

<sup>221</sup> See 47 C.F.R. § 63.10. Qwest is presently classified as a nondominant provider of telecommunications services under section 63.10. Qwest's status under section 63.10 will not change if it provides international telecommunications services on an integrated basis, rather than through a section 272 separate affiliate. See Qwest Jan. 22, 2007 *Ex Parte* Letter at 1.

83. IT IS FURTHERED ORDERED that, pursuant to sections 4(i), 4(j), 10, 201, 202, 203, 214, and 272, of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 160, 201, 202, 203, 214, and 272, and section 1.103(a) of the Commission's rules, 47 C.F.R. § 1.103(a), the Commission's forbearance decision SHALL BE EFFECTIVE on February 20, 2007. Pursuant to

sections 1.4 and 1.13 of the Commission's rules, 47 C.F.R. §§ 1.4 and 1.13, the time for appeal shall run from the release date of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

**APPENDIX A**  
**COMMENTERS**

<b>Commenter</b>	<b>Abbreviation</b>
AT&T Inc.	AT&T
BellSouth Corporation	BellSouth
Level 3 Communications, LLC	Level 3
COMPTEL	COMPTEL
New Jersey Division of the Ratepayer Advocate	New Jersey Ratepayer Advocate

<b>Reply Commenter</b>	<b>Abbreviation</b>
AdHoc Telecommunications Users Committee	AdHoc
AT&T Inc.	AT&T
New Jersey Division of the Ratepayer Advocate	New Jersey Ratepayer Advocate
Qwest Communications International Inc.	Qwest

**APPENDIX B**

**MARKET DATA**

Table 1 - Mass Market Customers (December 2006)			
	Long Distance Service	Wireline and Wireless Long Distance Usage	Local and Long Distance Bundle
Arizona	REDACTED		
Colorado			
Iowa			
Idaho			
Minnesota			
Montana			
North Dakota			
Nebraska			
New Mexico			
Oregon			
South Dakota			
Utah			
Washington			
Wyoming			
Minimum			
Maximum			
Median			
Source: Market shares are calculated using data submitted in this proceeding. See Qwest Jan. 8, 2007 Ex Parte Letter, Attachs. 1.b, 1.d, 1.h, 1.j; Qwest Jan. 10, 2007 Ex Parte Letter, Attachs. 1.f, A at 4; Qwest Jan. 17, 2007 Ex Parte Letter, Attachs. 1.a.i (corrected), 1.a.ii (corrected), 1.a.iii (corrected), 1.i.i (corrected). See supra paras. 33-35 for the underlying assumptions.			

Table 2 – Large Enterprise Customers (2006)			
Long Distance Voice Services			
State	Qwest Market Share	Market HHI	Number of Rivals in Market
Arizona	REDACTED		
Colorado			
Iowa			
Idaho			
Minnesota			
Montana			
North Dakota			
Nebraska			
New Mexico			
Oregon			
South Dakota			
Utah			
Washington			
Wyoming			
Minimum			
Maximum			
Median			
Frame Relay			
Arizona	REDACTED		
Colorado			
Iowa			
Idaho			
Minnesota			
North Dakota			
Nebraska			
New Mexico			
Oregon			
South Dakota			
Utah			
Washington			
Minimum			
Maximum			
Median			

Table 2 – Large Enterprise Customers (2006) (Continued)			
T1 Services			
State	Qwest Market Share	Market HHI	Number of Rivals in Market
Arizona	REDACTED		
Colorado			
Iowa			
Idaho			
Minnesota			
Montana			
North Dakota			
Nebraska			
New Mexico			
Oregon			
South Dakota			
Utah			
Washington			
Wyoming			
Minimum			
Maximum			
Median			
T3 Services			
Arizona	REDACTED		
Colorado			
Iowa			
Idaho			
Minnesota			
Oregon			
Utah			
Washington			
Minimum			
Maximum			
Median			
Source: Qwest Jan. 16, 2007 <i>Ex Parte Letter</i> , Attachs. 4.a-b (Franchise Area data). Staff calculations based upon product market/geographic area combinations with at least 30 observations. Large enterprise customers are defined as businesses with at least 250 employees.			

Table 3 – Small/Medium Business Customers (2006)			
Long Distance Voice Services			
State	Qwest Market Share	Market HHI	Number of Rivals in Market
Arizona	REDACTED		
Colorado			
Idaho			
Iowa			
Minnesota			
Montana			
Nebraska			
New Mexico			
North Dakota			
Oregon			
South Dakota			
Utah			
Washington			
Wyoming			
Minimum			
Maximum			
Median			
Frame Relay			
Arizona	REDACTED		
Colorado			
Iowa			
Minnesota			
New Mexico			
Oregon			
Utah			
Minimum			
Maximum			
Median			

Table 3 – Small/Medium Business Customers (2006) (Continued)			
T1 Services			
State	Qwest Market Share	Market HHI	Number of Rivals in Market
Arizona	REDACTED		
Colorado			
Idaho			
Iowa			
Minnesota			
Montana			
Nebraska			
New Mexico			
North Dakota			
Oregon			
South Dakota			
Utah			
Washington			
Wyoming			
Minimum			
Maximum			
Median			
T3 Services			
Minnesota	REDACTED		
Source: Qwest Jan. 16, 2007 <i>Ex Parte Letter</i> , Attachs. 4.a-b (Franchise Area data). Staff calculations based upon product market/geographic area combinations with at least 30 observations. Small/medium businesses are businesses with 5 to 249 employees.			

**APPENDIX C****SERVICE QUALITY MEASUREMENT PLAN  
FOR INTERSTATE SPECIAL ACCESS****Contents****Section 1: Ordering**

FOCT: Firm Order Confirmation (FOC) Timeliness

**Section 2: Provisioning**

PIAM: Percent Installation Appointments Met

NITR: New Installation Trouble Report Rate

**Section 3: Maintenance and Repair**

CTRR: Failure Rate/Trouble Report Rate

MAD: Average Repair Interval/Mean Time to Restore

**Section 4: Glossary**

## Section 1: Ordering

### **FOCT: Firm Order Confirmation (FOC) Timeliness**

#### **Definition**

Firm Order Confirmation (FOC) Timeliness measures the percentage of FOCs returned within the Company-specified standard interval.

#### **Exclusions**

- Service requests identified as “Projects” or “ICBs”
- Service requests cancelled by the originator
- Weekends and designated holidays of the service center
- Unsolicited FOCs
- Administrative or test service requests
- Service requests that indicate that no confirmation/response should be sent
- Other exclusions as defined by each RBOC to reflect system and operational differences

#### **Business Rules**

Counts are based on the first instance of a FOC being sent in response to an ASR. Activity starting on a weekend or holiday will reflect a start date of the next business day. Activity ending on a weekend or holiday will be calculated with an end date of the last previous business day. Requests received after the company’s stated cutoff time will be counted as a “zero” day interval if the FOC is sent by close of business on the next business day. The standard interval will be that which is specified in the company-specific ordering guide.

#### **Calculation**

**Firm Order Confirmation (FOC) Interval** = (a - b)

- a = Date and time FOC is returned
- b = Date and time valid access service request is received

**Percent within Standard Interval** = (c / d) X 100

- c = Number of service requests confirmed within the designated interval
- d = Total number of service requests confirmed in the reporting period

#### **Report Structure**

- Non-Affiliates Aggregate
- RBOC Affiliates Aggregate
  - RBOC 272 Affiliates Aggregate

#### **Geographic Scope**

- State

#### **SQM Disaggregation (Percent FOCs returned within Standard Interval)**

- Special Access – DS0
- Special Access – DS1
- Special Access – DS3 and above

## Section 2: Provisioning

### PIAM: Percent Installation Appointments Met

#### Definition

Percent Installation Appointments Met measures the percentage of installations completed on or before the confirmed due date.

#### Exclusions

- Orders issued and subsequently cancelled
- Orders associated with internal or administrative (including test) activities
- Disconnect Orders
- Other exclusions as defined by each RBOC to reflect system and operational differences

#### Business Rules

This measurement is calculated by dividing the number of service orders completed during the reporting period, on or before the confirmed due date, by the total number of orders completed during the same reporting period. Installation appointments missed because of customer caused reasons shall be counted as met and included in both the numerator and denominator. Where there are multiple missed appointment codes, each RBOC will determine whether an order is considered missed.

#### Calculation

**Percent Installation Appointments Met** =  $(a / b) \times 100$

- a = Number of orders completed on or before the RBOC confirmed due date during the reporting period
- b = Total number of orders where completion has been confirmed during the reporting period

#### Report Structure

- Non-Affiliates Aggregate
- RBOC Affiliates Aggregate
  - RBOC 272 Affiliates Aggregate

#### Geographic Scope

- State

#### SQM Disaggregation

- Special Access – DS0
- Special Access – DS1
- Special Access – DS3 and above

**NITR: New Installation Trouble Report Rate****Definition**

New Installation Trouble Report Rate measures the percentage of circuits or orders where a trouble was found in RBOC facilities or equipment within thirty days of order completion.

**Exclusions**

- Trouble tickets issued and subsequently cancelled
- Customer Provided Equipment (CPE) or customer caused troubles
- Troubles closed by the technician to disposition codes of IEC (Inter-exchange Carrier) or INF (Information)
- RBOC troubles associated with administrative service
- No Trouble Found (NTF) and Test OK (TOK)
- Other exclusions defined by each RBOC to reflect system and operational differences
- Subsequent trouble reports

**Business Rules**

Only the first customer direct trouble report received within thirty calendar days of a completed service order is counted in this measure. Only customer direct trouble reports that required the RBOC to repair a portion of the RBOC network will be counted in this measure. The RBOC completion date is when the RBOC completes installation of the circuit or order.

**Calculation**

**Trouble Report Rate within 30 Calendar Days of Installation** =  $(a / b) \times 100$

- a = Count of circuits/orders with trouble reports within 30 calendar days of installation
- b = Total number of circuits/orders installed in the reporting period

**Report Structure**

- Non-Affiliates Aggregate
- RBOC Affiliates Aggregate
  - RBOC 272 Affiliates Aggregate

**Geographic Scope**

- State

**SQM Disaggregation**

- Special Access – DS0
- Special Access – DS1
- Special Access – DS3 and above

### Section 3: Maintenance & Repair

#### CTRR: Failure Rate/Trouble Report Rate

##### Definition

The percentage of initial and repeated circuit-specific trouble reports completed per 100 in-service circuits for the reporting period.

##### Exclusions

- Trouble reports issued and subsequently cancelled
- Employee initiated trouble reports
- Trouble reports/circuits associated with internal or administrative activities
- Customer Provided Equipment (CPE) or customer caused troubles
- Troubles closed by the technician to disposition codes of IEC (Inter-exchange Carrier) or INF (Information)
- Tie Circuits
- No Trouble Found (NTF) and Test OK (TOK)
- Other exclusions as defined by each RBOC to reflect system and operational differences

##### Business Rules

Only customer direct trouble reports that require the RBOC to repair a portion of the RBOC network will be counted in this report. The trouble report rate is computed by dividing the number of completed trouble reports handled during the reporting period by the total number of in-service circuits for the same period.

##### Calculation

**Percent Trouble Report Rate** =  $(a / b) \times 100$

- a = Number of completed circuit-specific trouble reports received during the reporting period
- b = Total number of in-service circuits during the reporting period

##### Report Structure

- Non-Affiliates Aggregate
- RBOC Affiliates Aggregate
  - RBOC 272 Affiliates Aggregate

##### Geographic Scope

- State

##### SQM Disaggregation

- Special Access – DS0
- Special Access – DS1
- Special Access – DS3 and above

**MAD: Average Repair Interval/Mean Time to Restore****Definition**

The Average Repair Interval/Mean Time to Restore is the average time between the receipt of a customer trouble report and the time the service is restored. The average outage duration is only calculated for completed circuit-specific trouble reports.

**Exclusions**

- Trouble reports issued and subsequently cancelled
- Employee initiated trouble reports
- Trouble reports associated with internal or administrative activities
- Customer Provided Equipment (CPE) or customer caused troubles
- Troubles closed by the technician to disposition codes of IEC (Inter-exchange Carrier) or INF (Information)
- Tie Circuits
- No Trouble Found (NTF) and Test OK (TOK)
- Other exclusions as defined by each RBOC to reflect system and operational differences

**Business Rules**

Only customer direct trouble reports that require the RBOC to repair a portion of the RBOC network will be counted in this measure. The average outage duration is calculated for each restored circuit with a trouble report. The start time begins with the receipt of the trouble report and ends when the service is restored. This is reported in a manner such that customer hold time or delay maintenance time resulting from verifiable situations of no access to the end user premise, other CLEC/IXC or RBOC retail customer caused delays, such as holding the ticket open for monitoring, is deducted from the total resolution interval ("stop clock" basis).

**Calculation**

**Repair Interval** = (a – b)

- a = Date and time trouble report was restored
- b = Date and time trouble report was received

**Average Repair Interval** = (c / d)

- c = Total of all repair intervals (in hours/days) for the reporting period
- d = Total number of trouble reports closed during the reporting period

**Report Structure**

- Non-Affiliates Aggregate
- RBOC Affiliates Aggregate
  - RBOC 272 Affiliates Aggregate

**Geographic Scope**

- State

**SQM Disaggregation**

- Special Access – DS0
- Special Access – DS1
- Special Access – DS3 and above

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**GLOSSARY**

<b>Access Service Request (ASR)</b>	A request to the RBOC to order new access service, or request a change to existing service, which provides access to the local exchange company's network under terms specified in the local exchange company's special or switched access tariffs.
<b>RBOC 272 Affiliates Aggregate</b>	RBOC Affiliate(s) authorized to provide long distance service as a result of the Section 271 approval process.
<b>RBOC Affiliates Aggregate</b>	RBOC Telecommunications and all RBOC Affiliates (including the 272 Affiliate). Post sunset, comparable line of business (e.g., 272 line of business) will be included in this category.
<b>Business Days</b>	Monday thru Friday (8AM to 5PM) excluding holidays
<b>CPE</b>	Customer Provided or Premises Equipment
<b>Customer Not Ready (CNR)</b>	A verifiable situation beyond the normal control of the RBOC that prevents the RBOC from completing an order, including the following: CLEC or IXC is not ready to receive service; end user is not ready to receive service; connecting company or CPE supplier is not ready.
<b>Firm Order Confirmation (FOC)</b>	The notice returned from the RBOC, in response to an Access Service Request from a CLEC, IXC or affiliate, that confirms receipt of the request and creation of a service order with an assigned due date.
<b>Unsolicited FOC</b>	An Unsolicited FOC is a supplemental FOC issued by the RBOC to change the due date or for other reasons, e.g., request for a second copy from the CLEC/IXC, although no change to the ASR was requested by the CLEC or IXC.
<b>Project or ICB</b>	Service requests that exceed the line size and/or level of complexity that would allow the use of standard ordering and provisioning interval and processes. Service requests requiring special handling.
<b>Repeat Trouble</b>	Trouble that reoccurs on the same telephone number/circuit ID within 30 calendar days
<b>Service Orders</b>	Refers to all orders for new or additional lines/circuits. For change order types, additional lines/circuits consist of all C order types with "I" and "T" action coded line/circuit USOCs that represent new or additional lines/circuits, including conversions for RBOC to Carrier and Carrier to Carrier.

**JOINT STATEMENT OF  
COMMISSIONER MICHAEL J. COPPS AND  
COMMISSIONER JONATHAN S. ADELSTEIN,  
CONCURRING**

Re: *In the Matter of Petition of Qwest Communications International Inc. for Forbearance from Enforcement of the Commission's Dominant Carrier Rules as They Apply After Section 272 Sunset*, WC Docket No. 05-333

In this Order, the Commission conditionally grants forbearance to allow Qwest to provide long distance services on an integrated basis and subject to non-dominant carrier regulations. We support a conditional grant of relief here because the Commission must take into account the rapidly changing long distance market and the unique competitive position of the petitioner, and because this outcome is clearly superior to allowing this petition to be granted by Commission inaction without the safeguards described below. This Commission repeatedly has recognized that Section 272 provides for structural and accounting safeguards that form the principal guarantees against improper accounting practices and cross-subsidization. We concur because we remain concerned that the Commission has not completed its industry-wide review of these issues and does not have in place a comprehensive mechanism for monitoring changes in the marketplace (*e.g.*, in the long distance, wireless, and access markets) that would enable the Commission to reliably make decisions in this area.<sup>1</sup>

Nearly four years ago the Commission issued the *Section 272 Sunset Further Notice*, which was the second notice seeking comment on changes to the long distance market and the appropriate regulatory framework for carriers like the petitioner. That proceeding – much like this forbearance petition – addresses the important issue of what rules should govern Bell Operating Companies' (BOCs) provision of long distance services after the sunset of the Section 272 separate affiliate and related requirements. While we recognize that Congress specifically contemplated that Section 272's separate affiliate and related requirements sunset after three years, we have repeatedly urged the Commission to engage in a rigorous analysis of the need for alternative safeguards on an industry-wide basis.<sup>2</sup> Yet, rather than complete this rulemaking, the Commission adopts through this Order a combination of conditions – some voluntarily offered, others not – in order to facilitate the grant of a forbearance petition, which would raise serious questions if granted as filed.<sup>3</sup>

Although we would have preferred the Commission complete its Section 272 sunset proceeding, we recognize the efforts undertaken here to conduct a rigorous market analysis to provide a picture of petitioner's unique circumstances and the competitive landscape in which it operates. Indeed, there are notable changes to the long distance market in petitioner's territory that the Commission must account for. For many, though not all, consumers, the available options are being reshaped by the rise of wireless, cable,

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<sup>1</sup> See *Joint Statement of Commissioner Michael J. Copps and Commissioner Jonathan S. Adelstein, Concurring, Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, Further Notice of Proposed Rulemaking, WC Docket No. 02-112, FCC 03-111 (May 19, 2003) ("*Section 272 Sunset Further Notice*").

<sup>2</sup> Such an approach is also contemplated in the statute, which specifically preserves the Commission's ability to prescribe safeguards consistent with the public interest. See 47 U.S.C. § 272(f)(3).

<sup>3</sup> While these conditions help to mitigate the concerns we have regarding petitioner's market power and the impact of integrating their businesses on residential and business consumers, petitioner does not exist in a vacuum and the question of whether these conditions are appropriate on an industry-wide basis is not before us. The fact may well be that they are insufficient as applied to the situation of industry participants not present here.

and over-the-top VoIP services. We have also seen an increasing trend toward the availability and desirability of bundled services. We appreciate that this Order acknowledges these developments and takes steps to adjust our regulatory framework accordingly. In particular, we find persuasive the relative market shares of the petitioner in the long distance, and, in particular, the wireless market, which make potential unlawful discrimination less likely and relief more compelling in this case.

At the same time, it is not clear that all customers have benefited as dramatically from these changes, as many customers lack an effective choice of providers due to price or availability. It is imperative that the Commission remain vigilant about the continued evolution of this market. The most notable change in the long distance market, of course, is the entry of the BOCs such as the petitioner, which less than 5 years ago did not even compete in the long distance market. It therefore is important to remember that the market share levels analyzed in this Order have developed from a zero-baseline over a relatively short period of time. We have also seen increasing consolidation in this industry, including the merger of the two largest independent long distance companies into the two largest incumbent LECs. There have also been recent suggestions that the pricing for bundled services is evolving in a duopolistic manner, with higher prices for consumers.<sup>4</sup> We have repeatedly stated that competition must mean more for consumers than a choice between two providers, a cable and telephone company, and such a result would be an unfortunate back-sliding for long distance customers.

We appreciate that the Commission does adopt some notable and necessary safeguards in this Order to address some of these concerns. We were particularly pleased that the petitioner has committed to offering certain calling plans targeted for residential consumers who make relatively few long distance calls and to provide call detail information to enable consumers to make informed decisions about the most cost effective long distance plans. Regrettably, the needs of low volume consumers are often overlooked, although they have a real need for our vigilance.

This Order also makes some important findings with respect to the potential for price and performance discrimination. Notably, the Order acknowledges that incumbent providers like the petitioner retain the ability to raise their rivals' costs, and the Order maintains dominant carrier regulation for critical access services used by alternative long distance providers. The Order correctly concludes that certain requirements of Section 272 will continue to apply and adopts rules for imputation and reporting that should help the Commission and competitors evaluate whether the petitioner is engaging in price discrimination. In addition, we are pleased that petitioner has committed to comply with special access performance metrics to ensure that it does not engage in non-price discrimination in its provision of special access services.

Although these conditions may not be tailored in exactly the manner we would have crafted, their adoption is certainly preferable to the granting of the forbearance petition as filed. It is imperative for the Commission to monitor the effect of these safeguards, and we encourage the Commission to diligently verify whether its predictions about their sufficiency are accurate. In the meantime, we again encourage the Commission to return to its consideration of the Section 272 sunset rulemaking proceeding expeditiously and to evaluate the need for rigorous and more lasting conditions than the voluntary, time-limited conditions offered here.

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<sup>4</sup> See "Battle for the Bundle, 4Q06 Wireline Pricing Trends: Bells Turn the Corner on Price, Voice, & Data Bundles Up Y/Y", Bank of America (Jan. 24, 2007) (noting that "data appear to support our view that the emerging cable/telecom competitive price structure is unfolding in a duopolistic manner").